(2013) 01 GAU CK 0034

In the Gauhati High Court

Case No : Writ Petition (C) No. 12 of 2009

N.E. Packaged Drinking Water Manufacturer''s Association and Another — APPELLANT

Vs

State of Assam and Another — RESPONDENT

Date of Decision : 09-01-2013

Acts Referred:
Assam Value Added Tax Act, 2003 — Section 2(30)

Citation : (2013) 58 VST 1

Hon'ble Judges : A.K. Goel, C.J;N. Kotiswar Singh, J

Bench : Division Bench

Advocate : R.P. Agarwala, U. Bhuyan, R. Goenka, B. Chakraborty, A. Hazarika and A. Goenka, for the Appellant; K.N. Choudhury, Additional Advocate-General, Assam and Ms. R. Kakoti, for the Respondent

Judgement

A.K. Goel, C.J.—This petition seeks quashing of order dated September 30, 2008, passed by the Commissioner of Taxes, Assam, on an application by the N.E. Packaged Drinking Water Manufacturer''s Association seeking determination of the question whether transformation of noncommercial underground raw water into packaged drinking water amounted to "manufacture" as defined u/s 2(30) of the Assam Value Added Tax Act, 2003. The Commissioner, relying upon the judgment of the Kerala High Court in Teejan Beverages Ltd. Vs. State of Kerala and Others, held that no manufacturing was involved.

2. We have heard learned counsel for the parties.

3. The learned counsel for the petitioner submits that the processing of raw water into drinking water involves manufacturing process. He has relied upon process flow chart. He also submitted that drinking water is a distinct commodity than raw water and considering this aspect members of the petitioner-association have been granted eligibility certificate by the Director of Industries and Commerce for claiming incentives including sales tax exemption under the industrial policy which itself shows that the State has treated the process to be

manufacturing. Once eligibility certificates were issued, the same could not be cancelled unless there is violations of the conditions for exemption, merely on change of opinion on a debatable issue as held by this court in judgment dated August 23, 2012 in WP(C) No. 2603 of 20.11 (Sunil Kumar Taparia Vs. State of Assam and Others,). Reliance has also been placed on judgment of the honourable Supreme Court in Income Tax Officer, Udaipur Vs. Arihant Tiles and Marbles (P) Ltd., and the Madras High Court in Commissioner of Income Tax Vs. Vinbros and Company, ; [2009] 177 TAXMAN 217 (Mad).

4. Opposing the above submission learned Additional Advocate-General for the State of Assam supports the impugned order and submitted that mere processing the raw water into drinking water did not involve any manufacture as the water continues to be water as held by the Kerala High Court in Teejan Beverages Ltd. Vs. State of Kerala and Others, . He also placed reliance on judgment of this court in Deepak Kumar Poddar Vs. State of Assam and Others, ; Deepak Kumar Poddar Vs. State of Assam and Others, . He further submits that industrial policies were meant to encourage industrialization involving manufacture of goods. The word "manufacture" has been defined u/s 2(22) of the Assam General Sales Tax Act, 1993 and section 2(30) of the Assam Value Added Tax Act, 2003. Processing of raw water into drinking water was not covered within the concept of "manufacture" as defined under the Assam law. Cancellation of entitlement certificates was not proposed only on the basis of change of opinion on a debatable issue but on account of suppression of material facts and on the basis of binding law on the point.

5. We have given due consideration to the submissions advanced.

6. The question for consideration is whether processing of raw water into drinking water amounts to "manufacture" u/s 2(30) of the Assam Value Added Tax Act, 2003 and u/s 2(22) of the Assam General Sales Tax Act, 1993. In our view, the answer has to be in the negative.

7. The process undertaken by the petitioner is claimed to be as follows:

Process flow chart

8. The definition of "manufacture" u/s 2(22) of the Assam General Sales Tax Act, 1993 is as under:

"2.(22) ''manufacture'' with all its grammatical variations and cognate expressions means producing making extracting, altering ornamenting, blending, finishing or otherwise processing, treating or adapting any goods; but does not include a works contract or such manufactures or manufacturing processes as may be prescribed".

9. The question whether a process amounts to "manufacturing" has been dealt with in several judgments including in Ujagar Prints Vs. Union of India (UOI) and Others, . While the principle for determining whether a process amounts to "manufacturing" or not, is well-known, namely, when a distinct and new article

emerges as a result of the process, it can be held that manufacturing is involved, there are border line cases where either conclusion can be reached. Only such processes amount to manufacture as have impact on identity, nature and character of goods and not every process which may bring about some change in quality. The honourable Supreme Court observed in the said case (pages 423 and 424 in 74 STC):

42. The prevalent and generally accepted test to ascertain that there is ''manufacture'' is whether the change or the series of changes brought about by the application of processes take the commodity to the point where, commercially, it can no longer be regarded as the original commodity but is, instead, recognised as a distinct and new article that has emerged as a result of the processes. The principles are clear. But difficulties arise in their application in individual cases. There might be borderline cases where either conclusion with equal justification be reached. Insistence on any sharp or intrinsic distinction between ''processing'' and ''manufacture'', we are afraid, results in an oversimplification of both and tends to blur their interdependence in cases such as the present one. The correctness of the view in the Empire Industries Limited and Others Vs. Union of India and Others, cannot be tested in the light of material--in the form of affidavit expressing the opinion of the persons said to be engaged in, or connected with, the textile trade as to the commercial identity of the commodities before and after the processing--placed before the court in a subsequent case. These Opinions are, of course, relevant and would be amongst the various factors to be taken into account in deciding the question.

10. Coming to the present case, it is seen that though the raw water is subjected to the process of purification, it continues to be Water. Its character and use remains the same though quality has been improved. It cannot, thus, be held that a new and distinct commercial commodity has emerged on account of the process undertaken.

11. The matter was considered by the Kerala High Court in the light of judgment of the honourable Supreme Court in Tungabhadra Industries Ltd. Vs. The Commercial Tax Officer, Kurnool, , as follows (page 565 in 131 STC)

...ground water which is taken and used by the appellants as raw material for their finished product viz., mineral water/packaged drinking water, can be used for all purposes for which the so called mineral water is used. Similarly the so called mineral water can be used for all the purposes for which the ground water can be used. What is done by the appellants is to employ various processes described by them to bring the commodity more acceptable to a section of people for drinking purposes. According to us, notwithstanding the various processes employed by the appellants in converting the ground water it continues its identity as water, its character and use also remain the same though the quality of the said water has been raised to a certain level which is more acceptable to a section of people. Applying the principles laid down by the Supreme Court in the various decisions discussed above, and in the light of the definition of the word ''manufacture'' used in the notification mineral water/ packaged drinking water produced by the appellants in their units has to be treated as substantially the same as ground water. In other words it cannot be said that a new and distinct commercial commodity has emerged by the employment of various processes described by them on the ground water. In these circumstances, going by the meaning of the word "manufacture" as noted in the various decisions of the Supreme Court and other courts and by the definition of the same used in the notification the raw material, viz., the ground water even after the various processes undertaken by them has continued to be water with the same characteristic or use. The decision of the Constitution Bench of the Supreme Court in Tungabhadra Industries Ltd. Vs. The Commercial Tax Officer, Kurnool, and the decision of the Bombay High Court in Oil Processors Private Limited case [1998] 108 STC 44 (Bom) , mentioned above squarely apply.

12. We are in respectful agreement with the above observations.

13. Considering an identical definition in the Bombay Sales Tax Act in the context of breaking of big, stones into small stones and holding the same not to amount to manufacturing merely because small pieces of stones had different user or different commercial goods, the honourable Supreme Court in State of Maharashtra Vs. Mahalaxmi Stores, , held (page 81 in 129 STC):

5. From a perusal of the definition, extracted above, it is clear that the processes of producing, making, extracting, altering ornamenting, finishing or otherwise processing treating or adapting of any goods fall within the meaning of the term ''manufacture''. But it may be pointed out that every type of variation of the goods or finishing of goods would not amount to manufacture unless it results in emergence of new commercial commodity. In the instant case, the very nature of the activity does not result in manufacture because no new commercial commodity comes into existence.

14. Similar view was also taken in State of Maharashtra Vs. M/s. Shiv Datt and Sons, etc., , as follows (page 503 in 84 STC):

10. It is true that under the section it is not necessary that there should be ''manufacturer'' in the sense that a new commodity has been brought into existence as would have been required if that word is interpreted in its literal sense. But, at the same time, the section should be so interpreted to mean only such of the various processes referred to in the definition and applied to the goods as are of such a character as to have an impact on the nature of the goods.

15. The matter was also considered by this court in Deepak Kumar Poddar Vs. State of Assam and Others, ; Deepak Kumar Poddar Vs. State of Assam and Others, , wherein it was held, in the context of conversion of raw mustard oil into filtered mustard oil that no manufacturing was involved and it was concluded (pages 17 and 18 in 31 VST):

16. From the above discussions it would be clear that the true purport and

meaning of the wide definition of ''manufacture'' as contained in the Assam Act is that the expression ''manufacture'' with all its connotations under the definition would require the final product to be noticeably different from the basic input though both, i.e., the input and the final product may have some similar features. Production of a new commodity or a distinctly different commodity having a separate identity is the requirement of the dictionary meaning of the word ''manufacture'' which can have no application in the teeth of the exercise of legislative exercise resulting in the enactment of section 2(22) of the Act. The aforesaid ratio of the law, if applied to the facts of the present case, cannot bring the activity carried out in the petitioner''s unit within the meaning of the definition of ''manufacture'' contained in section 2(22) of the Act. The end-product ''mustard oil'' is fundamentally the same as the raw material/input used, i.e., raw mustard oil, inasmuch as, it is only the impurities in the raw mustard oil which is removed by a process of filtration.

16. In the light of the above observations, the impugned order cannot be held to be erroneous.

17. As regards judgments relied upon on behalf of the petitioner, it is not disputed that the parameters for determining as to which process amounts to manufacture are well-known, namely, when change or series of changes brought about by application of various processes take the commodity to the point where commercially it can no longer be known as original but instead known as distinct and new article. Application of this principle to individual fact situations may vary having regard to the nature of goods and the processes involved. The judgments relied upon on behalf of the petitioner are not in relation to the process of purifying raw water into drinking water. The same are on different fact-situations. Every process which may bring about some change cannot be treated to be manufacturing. The identity of the original commodity must be lost and instead a new identity must merge. This distinguishes the judgments relied upon by the petitioner. Moreover, the judgments relied upon by the Revenue are directly on and close to the issue in the context of goods involved. We, thus, uphold the stand of the Revenue.

18. As regards the submission that eligibility certificate once granted cannot be cancelled on a mere change of opinion, the applicability of such principle has yet to be gone into. Whether it is a case of mere change of opinion on a debatable issue or a case of mis-statement or error of application of binding law has to be gone into by the concerned authority. If it is held that it was not a case of mere change of opinion on a debatable issue but the case of wrong grant of eligibility certificate either on account of mis-statement or on account of ignoring the settled law, the appropriate authority may take a decision accordingly in accordance with law.

19. We, thus, do not find any ground to interfere with the impugned order. The writ petition is dismissed.

