(2013) 07 MAD CK 0339

In the Madras High Court

Case No : Tax Case (Revision) No''s. 44 to 47 of 2010 and 7 and 8 of 2011

Nestle India Limited APPELLANT

Vs

State of Tamil Nadu RESPONDENT

Date of Decision : 25-07-2013

Acts Referred:

Citation : (2013) 65 VST 406

Hon'ble Judges : K.B.K. Vasuki, J;Chitra Venkataraman, J

Bench : Division Bench

Advocate : N. Prasad, for the Appellant; Manohar Sundaram, Special Government Pleader, for the Respondent

Judgement

Chitra Venkataraman, J.—The following are the substantial questions of law on which the above tax case (revisions) were admitted:

(1) Whether the Sales Tax Appellate Tribunal has committed an error of law in failing to note that the ''Nestle Toned Milk'' sold by the petitioners was in fact ''fresh milk'' or ''pasteurized milk'' falling under Sl. No. 6 of Part B of the Third Schedule to the Tamil Nadu General Sales Tax Act, 1959?

(2) Whether the Sales Tax Appellate Tribunal has committed an error of law in rendering a finding that the milk sold by the petitioners was different from the pasteurized milk on account of the ultra heat treatment, done by the petitioners when in fact material marked by the petitioners had indicated that prior to ultra heat treatment the petitioners had undertaken pasteurization and that ultra heat treatment only made the pasteurization effective?

(3) Whether the Sales Tax Appellate Tribunal has committed an error of law in rendering its findings found between pages 9-11 of its order dated May 12, 2010 without opportunity to the petitioners to submit on these conclusions and to show that the conclusions sought to be drawn are erroneous?

(4) Whether the Sales Tax Appellate Tribunal has committed an error of law in

coming to the conclusion that the milk sold by the petitioners was in fact a milk-food or milk product falling under entry No. 4 of Part E of the First Schedule to the Act when in fact there was material to point to the conclusion that the milk fell within that entry?

(5) Whether the Sales Tax Appellate Tribunal has committed an error of law in confirming levy of penalty u/s 12(3)(b) of the Tamil Nadu General Sales Tax Act 1959 when in fact the penalty was not leviable on account of the Explanation to section 12(3)(b) of the Act?

Considering the issue raised in all these tax case revisions being one and the same the following common order is passed:

The assessee herein is in the business of marketing and sale of pasteurized toned milk sold under its brand name "Nestle Milk" in tetra pack. The assessee claimed exemption on the turnover on the ground that the sale of toned milk was nothing but pasteurized milk, falling under entry 6 of the Third Schedule, Part B of the Tamil Nadu General Sales Tax Act. The claim of the assessee, was however, disallowed by the assessing officer, assessing the turnover for the assessment year 2002-03 in respect of T.C. (R) No. 44 of 2010, 2000-01 in respect of T.C. (R) No. 45 of 2010, 2001-02 in respect of T.C. (R) No. 46 of 2010, 2002-03 on penalty in respect of T.C. (R) No. 47 of 2010, 2003-04 in respect of T.C. (R) No. 7 of 2011 and 2005-06 in respect of T.C. (R) No. 8 of 2011 as falling under entry 4(ii), Part E of the First Schedule to the Tamil Nadu General Sales Tax Act.

2. The assessee resisted the assessment by pointing out that the product sold by the assessee is pasteurized toned milk, sold under the brand name and at no stage of pasteurization, preservatives or additives are added to milk. Since the process undertaken had not resulted in milk different, the assessee sought for dropping of the proceedings, which included the levy of penalty. The assessee pointed out that fresh milk collected from villages is put through bactofugation and pasteurization process, i.e., heated up to a temperature of 74 degree centigrade for 15 seconds and then chilled at a temperature below 4 degree centigrade. Then it is transferred to Ultra Head Treatment 60 KL Silo and then sterilized in tetra therm aseptic. The term "pasteurization", when used in association with milk of different classes, meant heating (milk of different classes) by a heat treatment and cooling to a suitable temperature before distribution. The toned milk has minimum 3.5 per cent milk fat and minimum 8.5 per cent solid non-fat; thus the pasteurized milk sold by the assessee with its brand name merits to be exempted for taxation. The assessee reiterated that there was no preservatives or additives added to the milk. Thus pasteurization and UHT technology are heat treatment used for processing milk and this preserves most of the taste and nutrition, vitamin and protein value of the fresh product. As already pointed out, the claim of the assessee was rejected by the assessing officer. This led to the assessee filing an appeal before the Deputy Commissioner (Appeals).

3. The first appellate authority concurred with the assessing officer''s view. Referring to entry 4(ii) of Part E of the First Schedule to the Tamil Nadu General Sales Tax Act, the first appellate authority viewed that the use of the expression "includes" brought within its fold, toned milk too. He held that apart from pasteurization, there are other processes such as flavouring and sterilization. Hence the product would not fall under entry 6, Part B of the Third Schedule to the Tamil Nadu General Sales Tax Act. In the circumstances, the appeal was rejected. Aggrieved by this, the assessee went on further appeal before the Tamil Nadu Sales Tax Appellate Tribunal.

4. By a common order, the Tribunal rejected the assessee''s appeal. After pointing out to the distinction between the toned milk, recombined milk and reconstituted milk as well as to the meaning of the term "pasteurization", the Tribunal held that the process "pasteurization" and "UHT heating" were different; consequently, the UHT treated and processed Nestle toned milk in terra pack, not being same as pasteurized milk, would not qualify for exemption. In so holding, the Tribunal referred to the Tamil Nadu Value Added Tax Act, 2006, which contained the entry for UHT milk under entry 82 of Part B of the First Schedule to the Tamil Nadu Value Added Tax Act, 2006 and held that when UHT milk and pasteurized milk are treated differently, the intention of the Legislature thus being clear, the assessee was not entitled to any relief. Thus, the present appeals have been preferred by the assessee.

5. The learned counsel appearing for the assessee placed before us the relevant entries in the Tamil Nadu General Sales Tax Act as well as the clarification by the Commissioner of Commercial Taxes vide Letter No. D. Dis/Acts Cell II/24252/07, Clarification No. 73 of 2007 dated July 30, 2007, wherein he observed that the raw milk, made bacteria-free by pasteurization method/treatment and sold as plain milk in terra pack, is similar to milk packed in polythene film sachet and hence, eligible for exemption under entry 27(i) of Part B of the Third Schedule to the Tamil Nadu General Sales Tax Act and since clarification was issued prospective from the date of clarification, the same would apply for the years 1997-98 to 2000-2001. Learned counsel further drew our attention to the various distinction drawn between re-combined milk and re-constituted milk and to the meaning of the term "pasteurization" and "UHT" and contended that by ultra heat treatment, the milk, nevertheless retains its original character and except for the difference in the heating temperature from the pasteurized milk, practically, there is no difference at all to the treatment that one can meet out to the milk obtained by pasteurization or under UHT. He further pointed out that the product sold by the assessee carried no additives or flavour as had been wrongly presumed by the authorities below; in fact, the test report to that end also showed the milk products sold by the assessee contain no flavours at all.

6. Placing reliance on the decisions reported in Gujarat Co-operative Milk Marketing Federation Ltd. Vs. State of Kerala, as well as to A.G.K. Associates and Another Vs. State of Andhra Pradesh and Others, and Allahabad Dugdh Utpadak

Sahkari Sangh Limited Vs. Commissioner, Trade Tax, , learned counsel appearing for the petitioner submitted that given the meaning of "pasteurization" and the fact that no additives are made to the milk sold by the assessee, the same could not be brought under the First Schedule, thereby, denying the exemption.

7. Per contra, learned Special Government Pleader appearing for the Revenue supported the order of the assessing officer as well as the order of the Deputy Commissioner (CT) (Appeals) and submitted that pasteurization, being different from the product sold by the assessee, the turnover did not qualify for exemption.

8. Heard learned counsel appearing for the petitioner and the learned Special Government Pleader appearing for the respondent and perused the materials placed before this court.

9. We agree with the submissions made by the learned counsel appearing for the assessee. As already seen from the preceding paragraph, the Tribunal dismissed the assessee''s case primarily on the basis of the entries as are available under the Tamil Nadu Value Added Tax Act, 2006. When we are concerned about the assessment under the Tamil Nadu General Sales Tax Act, we do not find any justification on the part of the Tribunal making reference to the provisions under the Tamil Nadu Value Added Tax Act for the purpose of considering the claim of exemption. Leaving that aspect aside, a reading of various materials placed before this court shows that even in the case of sale of toned milk, pasteurization is an important process; that without boiling milk to a suitable temperature, the bacterial content therein cannot be removed. This is so required for the purpose of giving shelf life to milk. Thus, while pasteurization is a process of heating fresh milk at least to 71.5 degree centigrade, the ultra heat temperature goes further beyond that. The mere fact of further heat treatment to the milk to the higher degree does not mean any the less the product, being toned milk. It is no doubt true that in UHT packet, there are additives made to make good for the loss of vitamin content, therein by heating. As rightly pointed out by the learned counsel appearing for the petitioner, in the absence of any specific entry to give a distinct treatment to ultra high temperature heated milk product or milk packets under the Tamil Nadu General Sales Tax Act, toned milk would certainly call for similar treatment, be it a "pasteurized milk" with 74 degrees and odd treatment or "pasteurized milk", treated with ultra high temperature.

10. A reading of the order of the Appellate Assistant Commissioner as well as the reply given by the assessee points out the consistent case of the assessee that there are no additives to the pasteurized milk, sold as toned milk. In this context, the relevant entries under the Tamil Nadu General Sales Tax Act needs to be noted. During the period 2000, the relevant entry in the First Schedule, Part C, entry 12 dealing with milk food other than what is covered under the Third Schedule and the entry under the Third Schedule up to the period March 26, 2002 reads as under:

11. From March 27, 2002, the taxing entry on the First Schedule and Third

Schedule read as under:

12. A reading of the above entry under the Third Schedule, be it relevant to the period up to March 26, 2002 or even otherwise, shows that exemption is granted in respect of sale of fresh milk, pasteurized milk and directly reconstituted milk. Admittedly, milk treated to UHT was not separately treated as an item of taxation or as an item of exemption. In other words, when the entry reads as "pasteurized milk", all that it was concerned was "milk", which was subjected to pasteurization irrespective of the degree to which it has been heated. When the entry is thus clear indicating the item of exemption and further on the fact that the consistent case of the asses-see was that what was sold was without any additives and on the admitted fact that what was sold was only a pasteurized milk in the name of toned milk, we hold that for the purpose of finding tax liability, one need not travel beyond entry 6 of Part B of the Third Schedule to the Tamil Nadu General Sales Tax Act. In the circumstances, when the entry is very clear and the item sold by the assessee also admits that it is a pasteurized milk, and in the absence of any material placed by the Revenue that what was sold was flavoured milk, we have no hesitation in setting aside the order of the Tribunal thereby allowing the tax case (appeals).

13. In this context, the decision of the Kerala High Court reported in Gujarat Co-operative Milk Marketing Federation Ltd. Vs. State of Kerala, , merits to be seen. The facts therein were that entry 23 of the Third Schedule speaks of fresh raw milk including pasteurized, toned or reconstituted milk. The assessee therein sold milk after heating it to a particular temperature for certain minutes in the approved and properly operated equipment; there afterwards, cooled and supplemented it with vitamins A and D, because of the quantity of vitamins A and D being low. The Kerala High Court pointed out that the mere addition of vitamins A and D to the milk pasteurized, would not make the milk any the less "pasteurized milk" and by such addition, milk retains its natural flavour and characteristics. Thus holding the Kerala High Court allowed the claim of the assessee for exemption, as falling under entry 23 of the Third Schedule to the Act. In so holding, the Kerala High Court referred to the meaning of the expression "pasteurization" and pointed out that the method of pasteurization adopted by the assessee was ultra high temperature pasteurization and pasteurization referred to the process of heating every particle of milk to at least 63 degree centigrade for 15 seconds in approved and properly operated equipment. After pasteurization, the milk was immediately cooled to 5 degree centigrade or below. It pointed out that mild form of heat treatment kills any pathogenic bacteria that might be present without affecting nutritional value or the flavour. Keeping in background the dictionary meaning of the expression "pasteurization" and how the product is understood in common parlance, the High Court held that pasteurization does not make the milk different from natural milk or fresh milk and addition of vitamins A and D to the pasteurized milk, nevertheless retains its natural flavours and characteristics.

14. The decision of the Andhra Pradesh High Court which was referred to by the Tribunal reported in A.G.K. Associates and Another Vs. State of Andhra Pradesh and Others, is again a decision, which deals with ultra high temperature milk, and skimmed milk powder, where fresh milk and pasteurized milk were exempted under the Andhra Pradesh Value Added Tax Act. Pointing out to the distinct entries under the Andhra Pradesh Act to cover milk powder and UHT milk as distinct from fresh milk and pasteurized milk, the High Court held that pasteurized milk and UHT milk did not qualify for identical tax treatment; that given the distinct entries to cover these products, treating them as distinct separate goods, the assessee was not entitled to exemption for UHT milk.

15. The third decision cited by the learned counsel appearing for the petitioner relates to the decision of the Allahabad High Court reported in Allahabad Dugdh Utpadak Sahkari Sangh Limited Vs. Commissioner, Trade Tax, , wherein the Allahabad High Court pointed out that the exemption under the Uttar Pradesh Act related to sale of milk, which included milk of all nature. The addition of percentage of fat and SNF to the milk powder apart from addition of white butter, nevertheless qualify the product as milk exempted under the Act.

16. A reading of the abovesaid three decisions shows that the decisions rested on the provisions of the relevant State Acts. Nevertheless, as held in the decision of the Kerala High Court, addition of any vitamins to the pasteurized milk nevertheless retains its character as milk for the purpose of exemption and when the Andhra Pradesh High Court dealt with UHT milk as distinct from pasteurized milk, this was done on account of the differential treatment meted out on account of the distinct entries therein.

17. As already pointed out, as far as the present case is concerned, the entry in the Third Schedule of Part B of the Tamil Nadu General Sales Tax Act makes no distinction between "pasteurized milk" and "UHT milk", in the absence of any such distinction made and toned milk, by itself is again a pasteurized milk only, we have no hesitation in holding that the assessee is entitled to exemption as goods falling under the Third Schedule to the Tamil Nadu General Sales Tax Act.

18. It may be of relevance to point out herein that when the Commissioner himself has admitted that toned milk sold in sachets is also pasteurized milk qualifying for exemption, we do not find any justification to restrict it for a particular period alone as referred to in the clarification. In the circumstances, all the above tax case (appeals) stand allowed and the order of the Tribunal stands set aside. In view of our setting aside the order of assessment and accepting the case of the assessee for exemption, the question of levy of penalty does not arise. No costs.

