

(2010) 03 UK CK 0024
In the Uttarakhand High Court

Nestle India Limited

APPELLANT

Vs

State of Uttarakhand and Others

RESPONDENT

Date of Decision : 23-03-2010

Acts Referred:

Uttarakhand Value Added Tax Act, 2005 — Section 25(6), 3, 4, 4(2)

Citation : (2010) 1 UD 498 : (2010) 31 VST 404

Hon'ble Judges : B.S. Verma, J

Bench : Single Bench

Final Decision : Allowed

Judgement

B.S. Verma, J.—By means of this writ petition, the petitioner has sought the following reliefs:

(1) To issue a writ, order or direction in the nature of writ of certiorari quashing the circular dated May 30, 2009 (annexure 1 to the writ petition) issued by the Commissioner of Taxes, Uttarakhand, district Dehradun, respondent No. 2.

(2) To issue a writ, order or direction in the nature of certiorari quashing the order dated July 8, 2009 passed by the Deputy Commissioner (Assessment), Commercial Taxes, Rishikesh, respondent No. 3 for the assessment year 2005-06.

(3) To issue a writ, order or direction in the nature of mandamus or prohibition restraining/prohibiting the respondents from realizing VAT at 12.5 per cent on the sale of tomato sauce.

(4) To issue any suitable writ, order or direction as this honourable court may deem fit and proper in the circumstances of the case.

(5) To award costs throughout to the petitioner.

2. Brief facts giving rise to this writ petition, according to the petitioner, are that the petitioner is a public limited company incorporated under the Indian Companies Act having its registered office at M-5A, Connaught Circus, New Delhi

and the petitioner is registered under the Uttarakhand VAT Act as well as under the Central Sales Tax Act. The petitioner is carrying on sale of various goods including processed and preserved vegetable, fruits apart from milk powder, baby food, etc. The petitioner has been regularly filing its return and depositing tax in respect of sale of various goods, which are applicable under Schedule of rate prescribed u/s 4 of the Uttarakhand VAT Act, 2005 (for short "the Act").

3. A show-cause notice was issued on June 19, 2009 by the assessing authority on account of circular dated May 30, 2009, which was issued by the Commissioner of Tax, Uttarakhand, copy of which was sent to all the Additional Commissioners and all Joint Commissioners with a direction that a copy of the circular be sent to all the assessing authorities and all other lower authorities.

4. In response to the show-cause notice, the petitioner submitted a detailed reply on June 29, 2009, wherein it was pointed out that the assessment for the assessment year 2005-06 u/s 25(6) of the Act has already become barred by limitation, as the proviso to Section 25(6) clearly provides that no order u/s 25(6) shall be passed after expiry of three years from the close of the year to which the assessment relates. Apart from it, it was also pointed out that no reason has been given by the authority why tomato ketchup shall be taxable at 12.5 per cent. The assessing authority without considering the objection filed by the petitioner passed an order on July 8, 2009.

5. As per averment of the petitioner, the impugned circular dated May 30, 2009 issued by the Commissioner of Taxes, Uttarakhand, which has been relied upon by the assessing authority, is absolutely contrary to law with regard to tomato sauce being not included in item No. 6 of Schedule II(B) and is without any basis. By administrative circular the classification of a commodity cannot be made by the Commissioner and the direction of the Commissioner that sauce is not covered by Schedule II(B) of the Act is based on erroneous interpretation and surmises and conjectures.

6. Tomato sauce is covered by entry 6 of the Schedule II(B) of the Act, which is liable to be taxed at four per cent and the same cannot be subjected to tax as unclassified item because it falls within the purview of the processed fruit or processed vegetable and also under the illustrative definition, which has been given in entry No. 6 like fruit jams, jellies, fruit squash and paste, etc. The said circular states that item 6 of Schedule II(B) covers all processed and preserved vegetables besides it covers vegetable mushrooms and products made out of fruit. The Commissioner has ignored to see that tomato sauce being a product made out of tomato fruit is clearly covered by item 6 of Schedule II(B). Entry 24 of Schedule I of the Act covers fresh vegetables and fruits, which are not subjected to tax. The Commissioner has ignored the fact that vegetables and fruits have to be necessarily classified either as fresh (Schedule I) or as processed and preserved (Schedule II(B)) and there is no occasion to any classification under residual entry.

7. On behalf of the respondents, counter-affidavit has been filed. It is stated in the counter-affidavit that the petitioner has not deposited proper tax in respect of sale of tomato sauce. It is also stated that the State Government has extended the limitation for assessment for the year 2005-06 up to September 30, 2009 by notification dated March 3, 2009, therefore, the show-cause notice issued by respondent No. 3 and the assessment order dated July 8, 2009 is well within limitation. It is also stated that the Commissioner of Taxes has given reasons for non-inclusion of tomato sauce in entry No. 6 of Schedule II(B) of the Act and the tomato sauce is not covered under any item specified in the said entry. It is further stated that the petitioner has intended to seek extension of the scope of the entry, which is not permissible under law. The Legislature had deliberately given certain specific forms and only those forms are entitled to be taxed at lower rate of tax. Tomato sauce is not a processed vegetable. It is not a paste, which can be used in place of tomato as a substitute of tomato and is beyond the scope of entry No. 6 of Schedule II(B) of the Act. Tomato sauce though prepared from tomato, is not sold as tomato and the form in which it is sold is not mentioned in entry No. 6, therefore, it is liable to be taxed as unclassified item.

8. Rejoinder affidavit has been filed on behalf of the petitioner, wherein the assertions made in the counter-affidavit have been controverted and the averments made in the memo of writ petition have been reiterated. It is stated that the classification of tomato sauce as unclassified item is absolutely unjustified. The petitioner has annexed extracts of the National Industrial Classification issued by the Government of India as annexure RA-1 to the rejoinder affidavit and has also annexed the extract taken from the website of Ministry of Food Processing Industries as annexure RA-2. They shall be dealt with in the latter part of the judgment as and when required.

9. I have heard learned Counsel for the parties and perused the record including the averments made in the memo of petition, the counter-affidavit filed on behalf of the respondents and the rejoinder affidavit.

10. Though in the memo of writ petition, the petitioner has also challenged the show-cause notice June 19, 2009 u/s 25(6) of the Act on the ground of limitation, but no arguments were advanced on behalf of the petitioner in this writ petition to substantiate the challenge of show-cause notice on the point of limitation, therefore, it has to be held that the show-cause issued by respondent No. 3 is within time.

11. Therefore, the only question to be answered in the present writ petition is - whether the tomato sauce is covered by entry 6 of the Schedule II(B) of the Act which is liable to be taxed at four per cent or not.

12. For a just decision of the controversy, a reference to certain provisions of the Act is necessary. Section 4 of the Act deals with rate of tax. Section 4(2) reads as under:

(2) (a) No tax under this Act shall be payable on the sale or purchase of the goods specified in Schedule I;

(b) Subject to the provisions of Section 3, a dealer shall be liable to pay tax on his taxable turnover-

(i) at every point of sale at the rate hereafter provided: (a) in 12.5 per cent. respect of goods specified in Schedule II(A) one per cent, (b) in respect of goods specified in Schedule II(B) four per cent, (c) in respect of goods specified in Schedule II(C) at the rate specified therein, (d) in respect of goods other than those included in any of the Schedules

13 The description of goods mentioned under Schedule II(B) of the Act is subject to tax at the rate of four per cent at every point of sale. At serial No. 6 the description of goods has been given as under:

All processed and preserved vegetables, vegetable mushrooms and fruits including fruit jams, jellies, fruit squash, paste, fruit drinks and fruits juices and achar (whether in sealed containers or otherwise).

14. The learned Counsel for the petitioner has vehemently contended that all items of vegetables or fruits that undergo any form of processing would deserve to be classified as items of processed vegetables or fruits. The learned Counsel for the petitioner has further contended that the Ministry of Food Processing Industry has specifically mentioned that food processing sector includes the fruit and vegetable processing also and the major product processed out therefrom includes not only jam, jellies, squash but also the sauces. In support of his contention, the learned Counsel has placed reliance upon the Division Bench judgment rendered by the Gauhati High Court in the case of *Pepsico India Holdings Pvt. Ltd. v. State of Assam* [2009] 25 VST 41. In paragraph 21, the following observations have been made (at page 49):

All items of vegetables or fruits that undergo any form of processing so long such items have an acceptable degree of similarity, in our considered opinion, would deserve to be classified as items of processed vegetables or fruits, as may be. A person buying jam or jelly or pickle does not buy such items either as a fruit or vegetable item; yet, jam, jelly and pickle, etc., have been included as items of processed vegetable or fruit under entry 80. "Potato chips" processed or manufactured from potato, though it may be sold or purchased as a snack item, discloses certain common characteristics or features that are to be found in fruit or vegetable items specifically included under entry 80. In such a situation, we are of the view that it would be correct to hold that "potato chips", though not specifically included, yet, as the same have not been excluded either, would come within the inclusive definition of "processed vegetable or fruit" so as to fall under entry 80 of Part A of the Second Schedule to the Act.

15. It is not disputed that apple-sauce is included in food processing.

16. On the other hand, the learned Counsel for the respondents-State has

contended that entry 6 of Schedule II(B) of the Act nowhere included tomato sauce. Therefore, it would be taken that tomato sauce stood excluded from entry 6 of Schedule II(B). The contention of the learned State counsel is not accepted for the following reasons:

Firstly, a plain reading of entry 6 of the Schedule II(B) would show that all processed and preserved vegetables, vegetable mushrooms and fruits including fruit jams, jellies, fruit squash, paste, fruit drinks and fruit juices (whether in sealed containers or otherwise) are made liable to payment of four per cent tax under the Act on sale. When the Legislature has included jams, jellies, squash, paste derived from fruit and vegetables within the ambit of entry 6, there is no reason why the tomato sauce be not treated under this category. I am of the considered view that "all processed and preserved vegetables and fruits" would also include sauce prepared and manufactured from any vegetable and fruit particularly when there is no exclusion Clause given to exclude "sauce" from the ambit of entry 6. If a processed vegetable or fruit is to be understood in the ordinary way, none of the items specifically included in entry 6 of Schedule II(B) of the Act could have been so included. Moreover, from a bare perusal of the entry in respect of processing and preserving of fruit and vegetables of the extract of National Industrial Classification annexed as annexure RA-1 to the rejoinder affidavit, it is obvious that sun-drying of fruit and vegetables, artificial dehydration of fruit and vegetables, radiation preservation of fruits and vegetables, manufacture of fruit or vegetable juices and their concentrates, squashes and powder, manufacture of sauces, jams, jellies and marmalades, canning of fruits and vegetables, manufacture of potato flour and meals and prepared meals of vegetables and preservation of fruit and vegetables are covered under processing and preserving of fruits and vegetables. Therefore, from any stretch of imagination, it cannot be said that tomato sauce would be excluded from the ambit of processing and preserving of fruit and vegetables merely because the Legislature has not included the word "sauce" in entry 6. In my opinion, if it had been the intention of the Legislature to exclude the vegetable and fruit sauce from the ambit of entry 6, the Legislature must have said so in the description of goods given in Schedule II(B) of the Act.

Secondly, where the Legislature has intended to exclude any particular item from the ambit of the entries of Schedule II(B) of the Act, there has been specific mention to that effect as to what items are not included in the entries.

Thirdly, the learned Counsel for the petitioner in order to demonstrate that the tomato sauce is a processed fruit/vegetable has annexed extract of the National Industrial Classification issued by the Government of India as annexure RA-1 to the rejoinder affidavit. A perusal of Part II pertaining to Detailed Structure (NIC-2008) goes to show that at page No. 38, there is description of processing and preserving of fruit and vegetables at class No. 1030 which specifically excludes (i) manufacture of flour or meal of dried leguminous vegetables, (ii) preservation of fruit and nuts in sugar, (iii) manufacture of prepared vegetable

dishes and (iv) manufacture of artificial concentrates. At sub-class 10305 there is mention of manufacture of sauces, jams, jellies and marmalades. Thus, it would be seen that processing and preserving of fruit and vegetables include manufacture of sauces, jams, jellies and marmalades. Therefore, the Legislature has nowhere put exclusion Clause in respect of sauce from entry No. 6 aforesaid.

Fourthly, in the case at hand, there is no possibility that two views are possible whether the petitioner is liable to pay value added tax at 12.5 per cent or at four per cent. Even if it is taken that two views are possible in the matter that the petitioner's case may fall under entry 6 or outside the ambit of entry 6 of Schedule II(B) of the Act, the view which is favourable to the assessee shall be adopted. It is settled law that when two views are possible, one which favours the assessee has to be adopted. I am fortified in my view by the apex court judgment in the case of Bihar State Electricity Board and another Vs. M/s. Usha Martin Industries and another, .

17. In view of the discussion above, I am of the considered view that the Legislature has not intended to exclude "sauce" from the ambit of entry 6 of Schedule II(B) of the Act what to say of "tomato sauce". It is held that "tomato sauce" though not specifically included in entry 6, yet, as the same has not been excluded either, would come within the inclusive definition of "all processed vegetables and fruits" and the same is taken to have been included in entry 6 aforesaid. That being so, the petitioner is liable to pay value added tax at every point of sale at the rate of four per cent in respect of tomato sauce. The petitioner is not liable to pay VAT at 12.5 per cent on the sale of tomato sauce. Consequently, the impugned circular dated May 30, 2009 issued by the Commissioner of Taxes Uttarakhand (annexure 1 to the writ petition) is liable to be quashed. Accordingly, the assessment order dated July 8, 2009 passed by respondent No. 3 imposing VAT on the sale of tomato sauce at 12.5 per cent instead of four per cent is liable to be set aside. The writ petition deserves to be allowed accordingly.

18. The writ petition is allowed. The impugned circular dated May 30, 2009 issued by respondent No. 3 (annexure 1 to the petition) is quashed. Consequently, the assessment order dated July 8, 2009 passed by respondent No. 3 for the assessment year 2005-06 in so far as it relates to imposition of value added tax at 12.5 per cent on sale of tomato sauce against the petitioner (annexure 3) is set aside. The respondents are further restrained by a writ of mandamus from realizing value added tax at 12.5 per cent on the sale of tomato sauce from the petitioner. No order as to costs.