
(2016) 02 KL CK 0030
In the High Court Of Kerala
Case No : O.T. Appeal No. 7 of 2015

Parle Agro Pvt. Ltd.

APPELLANT

Vs

Commissioner Commercial Taxes

RESPONDENT

Date of Decision : 05-02-2016

Acts Referred:

Kerala Value Added Tax Act, 2003 — Section 6, Section 6 (1)(a), Section 6(1) (a),
Section 6(1)(a), Section 62(1), Section 94

Citation : (2016) 1 KLT 127

Hon'ble Judges : T.B. Radhakrishnan and Anu Sivaraman, JJ.

Bench : Division Bench

Advocate : Arshad Hidayathullah, Sr. Adv., Premjit Nagendran and N.S. Shaji, Advocates, for the Appellant; George Mecheril, Senior Government Pleader, for the Respondent

Final Decision : Dismissed

Judgement

Anu Sivaraman, J.—1. This appeal under Section 62(1) of the Kerala Value Added Tax Act (hereinafter referred to as "the Act") is directed against Annexure 4 order of the authority issued under Section 94 of the Act. The appellant who is a manufacturer of the product "Appy Fizz" had preferred Annexure 2 application for clarification under Section 94 of the Act. The clarification sought was whether the product, which had been classified as a "Fruit Juice Based Drink", is liable to be included under Entry No. 71(5) as similar other products not mentioned under any other entry in the list or any other schedules and would therefore be chargeable to VAT @ 14.5%. Clarification was also sought whether the product classified under Clause (d) of Sub-section (1) of Section 6 of the Act is mutually exclusive of the products classified under Clause (a) of Sub-section (1) of Section 6.

2. The main contention urged by the appellant before the authority was to the effect that the product had been classified as a "Fruit Juice Based Drink" under the Central Excise Tariff Act as well as under the Fruit Processing Order. The

appellant had made available several technical opinions and certificates issued by various authorities to state that the drink was not "carbonated water" and was a "Fruit Juice Based Drink" containing fruit juice to an extent of more than 10% and that it had been assessed as a "Fruit Juice Based Drink" till the Finance Act of 2007 amended Section 6(1)(a) of the Act by specifying that aerated branded soft drinks excluding soda would be liable to tax @ 20% at all points of sale within the State. The list of goods taxable at the rate of 12.5% notified by SRO 82/2006 was also amended by SRO 119 of 2008 and the entry "Fruit Juice Based Drink" was deleted and all the H.S.N codes were removed.

3. The authority considered the contentions raised and held that the product is aerated branded soft drink coming specifically within the ambit of the Entry contained in Section 6(1)(a) of the Act as amended and therefore would not fall within the residuary entry in Entry 71(5) of the notified list. It was clarified that the products classified under Clause (d) of Sub-section (1) of Section 6 are mutually exclusive of the products classified under Clause (a) of Subsection (1) of Section 6. Aggrieved thereby, the assessee has come in appeal.

4. Heard Sri. Arshad Hidayathullah, learned Senior Counsel for the appellant and Sri. George Mecheril, learned Special Government Pleader for the State Revenue. It is the contention of the counsel for the appellant that the authority constituted under Section 94 erred in limiting itself by the findings of a Division Bench of this Court in O.T.R. No. 114 of 2013 dated 17.11.2014. It is contended that the judgment in the OTR was rendered in the case of a distributor of the appellant and it was only a revision from an order of the Tribunal decided on the basis of the materials produced and the only consideration was whether the Tribunal had decided erroneously or failed to decide any question of law. The scope of the clarification under Section 94 being much wider and having far reaching consequences, the committee should have applied its mind to the questions raised before it, especially in view of the binding judgment of a Division Bench of this Court in W.A. No. 2418/2015, wherein the question of clarification was directed to be decided on its merits. It is further urged that the product had been classified as a "Fruit Juice Based Drink" with HSN Code No. 2202.90.20 under the Excise Tariff Act. It is contended that the classification of the product as a "Fruit Juice Based Drink" had been upheld by the Customs, Excise and Service Tax Appellate Tribunal and the Civil Appeal filed against the said finding by the Revenue had been dismissed. It is also contended that till the amendment of the KVAT Act in 2007, the product was being subjected to tax as a "Fruit Juice Based Drink" by the authorities in Kerala as well and no change has occurred in the nature of the product to take it out of the residual classification and to place it as an aerated branded soft drink, which is liable to tax at higher rate. It is also contended that the provisions of a taxing statute are to be strictly construed and the burden of proof lay heavily on the revenue to prove that the product, which had been classified and taxed as a "Fruit Juice Based Drink", was now liable to tax as "aerated branded soft drink" at higher rate. The learned Senior Counsel relies on the decisions of the Hon'ble Supreme Court of India in Hindustan

Ferodo v. Union of India (1997 (89) ELT 16), Pudumjee Pulp & Papers Mills v. Union of India (1951 (51) ELT 235), Advani-Oerlikon Ltd. and another v. Union of India and others [, 1981 ELT 432 (Bom.)] Commissioner of Central Excise v. Godrej Hershey Ltd.(, 2015 (324) E.L.T.246 (SC).

5. Learned Special Government Pleader, on the other hand, would contend that with the amendment to the KVAT Act, the only question to be considered is whether the product is an aerated branded soft drink. It is contended that even on a preliminary examination of the contentions raised by the appellant, it is clear that the appellant failed in proving before the committee that the product in question was not an "aerated branded soft drink" which was specifically included as taxable at 20% at all points of sale within the State. It is contended that the classification of the product under the Fruit Products Order or the Central Excise Tariff Act or Customs Act can have no application in view of the specific entry contained in the KVAT Act. The order of the Customs, Excise and Service Tax Appellate Tribunal had dealt with the question whether the product was Fruit Juice Based Drink with HSN code 2202.90.20 or aerated waters with code 222.10.10. On the finding that the product contained 27% fruit juice, the Tribunal held that it is not aerated waters. The entry "Fruit Juice Based Drink" having been taken away by SRO 119 of 2008, and aerated branded soft drinks having been specifically included with a higher rate of tax, the technical opinions regarding nature of the product has only limited relevance, it is urged. It is also stated that the appellant itself has no consistent case about the nature of its product and the same product, which was found to contain 27% fruit juice by the CESTAT, is labelled by the appellant as containing 12.7% fruit juice content in the instant case.

6. It is true that the committee constituted for the purpose of Section 94 of the Act had relied almost entirely on the findings of a Division Bench of this Court in OTR No. 114 of 2013 to hold that the product was an aerated branded soft drink and could not be classified as a "Fruit Juice Based Drink". However, what is before us is a first appeal under Section 62(1) of the KVAT Act. On agreement of the counsel appearing on either side, we deem it appropriate at this stage to consider the question of classification rather than remanding the matter to the committee to be decided afresh.

7. It is not in dispute before us that the product in question is a soft drink. It is alleged that it had been earlier subjected to tax at 12.5% (later 13.5% and 14.5%) on the basis of its classification as a Fruit Juice Based Drink. Before the amendment of the list, going by the provisions contained in SRO 82/2006, the Entry 71 originally reads as follows:-

"Non-alcoholic beverages and their powders, concentrates and tablets including (i) aerated water, soda water, mineral water, water sold in sealed containers or pouches (ii) fruit juice, fruit concentrate, fruit squash, fruit syrup and fruit cordial (iii) soft drinks (iv) health drinks of all varieties (v) other non-alcoholic beverages; not falling under any other entry in this List or in any of the

Schedules.

8. It is pertinent to note that Section 6(1)(a), as it stood prior to the amendment brought about by the Finance Act of 2006, did not contain any reference to aerated soft drinks. By the Finance Act of 2007, Section 6(1)(a) was amended specifying aerated drinks including mineral water, packaged drinking water and branded soft drinks excluding soda with the six figure HSN code of 2202.10 as being taxable @ 20%. This entry therefore contained fruit pulp or fruit juice based drink with HSN code 2202.90.20 as sub entry 4. It was in the above circumstances that the appellant's product which had the same HSN code was classified and taxed under the erstwhile Entry 71(4). After the amendment brought about by the Finance Act of 2007 and the substitution of Entry 71 by SRO No. 119 of 2008, the Entry 71 was completely substituted. Entry 71 as substituted by SRO No. 119 of 2008 reads as follows:-

"71. Non-alcoholic beverages and their powders, concentrates and tablets in any form including;

"(1) aerated water, soda water, mineral water, water sold in sealed containers or pouches

(2) fruit juice, fruit concentrates, fruit squash, fruit syrup and pulp and fruit cordial

(3) soft drinks other than aerated branded soft drinks

(4) health drinks of all varieties

(5) similar other products not specifically mentioned under any other entry in this list or in any other Schedules."

9. It is seen that with the substitution, the sub entry "Fruit Juice Based Drink" stood deleted. The HSN codes in respect of all the relevant entries also stood obliterated by the amendments. In the above circumstances, the authority was called upon to decide on the classification of the product on the basis of common parlance or commercial parlance.

10. No HSN codes are mentioned in respect of any of the entries in the KVAT Act. Therefore, the nature of the product is to be decided on common parlance or commercial parlance. The learned Senior Counsel for the appellant contends that a wealth of material, including orders of the authority under the Excise regime, which was affirmed by the Apex Court as well as certifications issued by competent technical authorities, had been placed before the authority to show that the product was a "Fruit Juice Based Drink". Therefore, the only conclusion which the authority could legally have reached was that the product was liable to be included in the residuary appendix 5 in Entry 71 of the list of goods taxable at concessional rates. No material was produced by the Revenue to warrant an inclusion of the product as an aerated branded soft drink and therefore the finding of the authority, which was based solely on the findings of a Division

Bench of this Court, which is of a limited scope, is liable to be set aside.

11. We have considered the rival contentions. The only question to be decided is whether the product is an aerated branded soft drink which would make it liable to tax at a higher rate. The findings of the authorities under the fruit, labelling and excise regime to the effect that the product is a "Fruit Juice Based Drink", would be completely irrelevant in case the product falls within the ambit of the Entry "aerated branded soft drink".

12. The manner in which an entry should be understood in a case where HSN code is not incorporated in the statute is indicated in the Rules of Interpretation as contained in the Schedule to the KVAT Act. The relevant portion of this provision reads thus:-

""The commodities in the schedules are allotted with Code Numbers, which are developed by the International Customs Organization as Harmonized System of Nomenclature (HSN) and adopted by the Customs Tariff Act, 1975. However, there are certain entries in the schedules for which HSN Numbers are not given. Those commodities which are given with HSN Numbers should be given the same meaning as given in the Customs Tariff Act, 1975. Those commodities which are not given with HSN Number should be interpreted, as the case may be, in common parlance or commercial parlance. While interpreting a commodity, if any inconsistency is observed between the meaning of a commodity without HSN Number and the meaning of a commodity with HSN Number, the commodity should be interpreted by including it in that entry which is having the HSN Number."

13. Going by common parlance that the product is a soft drink is beyond dispute. Aeration being the process of adding a gas especially carbon dioxide to a liquid under pressure or "charging with air or carbon dioxide or other gas". It is clear from the material produced by the assessee itself that the product is an aerated drink. That it is branded is also beyond dispute. The question whether the product would be a "Fruit Juice Based Drink" under the Central Excise and Salt Act would be wholly irrelevant in view of the fact that it comes squarely within the specific entry, aerated branded soft drink as contained in Section 6 (1)(a) which has been specifically made liable to tax at the rate of 20%. A reading of Entry 71 of the notified list as amended would go to show that aerated water and soda water are the aerated products included in the entry. Sub entries 2 to 4 refer to soft drinks which are not aerated or branded and to health drinks. This is clearly because aerated branded soft drinks have already been included in the tax net with a higher rate of tax. The residual sub entry (5) of Entry 71 would be attracted only if the product cannot be included elsewhere. Aerated branded soft drink excluding soda having already found a place under Section 6(1) (a) of the Act, it cannot be included in the residuary entry. In the above circumstances, the product answers to the description of aerated branded soft drink which would fall specifically within the confines of Section 6(1)(a). The finding of the committee in the impugned order, therefore, cannot be faulted. We find no material irregularity

or error in the finding entered in the impugned order. We therefore confirm the order. The appeal fails and is accordingly dismissed. No costs.