
(2009) 04 GAU CK 0033
In the Gauhati High Court

Pepsico India Holdings Pvt. Ltd.

APPELLANT

Vs

State of Assam and Others

RESPONDENT

Date of Decision : 28-04-2009

Acts Referred:

Assam Value Added Tax Act, 2003 — Section 105, 81
Prize Chits and Money Circulation Schemes Banning Act, 1978 — Section 2

Citation : (2009) 6 GLR 16 : (2009) 5 GLT 85 : (2009) 25 VST 41

Hon'ble Judges : Ranjan Gogoi, J;B.P. Katakey, J

Bench : Division Bench

Final Decision : Allowed

Judgement

Ranjan Gogoi, J.—The core issue arising in this revision petition filed by the petitioner-company is whether "potato chips" manufactured and sold by the petitioner-company under the brand name "Lays" and "Uncle Chips" would be covered by entry 80 of Part A of the Second Schedule to the Assam Value Added Tax Act, 2003 (hereinafter referred to as, "the Act") or the said product would fall under the residuary entry covered by the Fifth Schedule to the Act. The aforesaid question arises out of an order dated September 10, 2007 passed by the Commissioner of Taxes, Assam on an application filed by the petitioner-company u/s 105 of the Act.

2. The Assam Value Added Tax Act, 2003, has been brought into effect from May 1, 2005. The Act contains five Schedules. The First Schedule enumerates goods that are exempted from payment of tax. The Second Schedule consists of three parts?Part A, Part B and Part C which deal with different items chargeable to tax at the rate of four per cent. The Third and the Fourth Schedule which would not be relevant for the present adjudication deal with gold, silver, ornaments, jewellery, etc. etc., which are chargeable to tax at the first point of sale. The Fifth Schedule includes within its fold, works contract, lease transactions and "all other goods not covered by the First, Second, Third and Fourth Schedules".

3. Entry 80 of Part A of the Second Schedule at the relevant time was in the

following terms:

80. Processed or preserved vegetables and fruits including fruit jam, jelly, pickle, fruit squash, paste, fruit drink and fruit juice.

4. The petitioner-company, who claims to have consistently classified the "potato chips" manufactured by it under the aforesaid entry 80 of Part A of the Second Schedule and collecting and paying value added tax (VAT) at the rate of four per cent on the turnover relating to sale of "potato chips", received a communication dated February 5, 2007 from the jurisdictional Superintendent of Taxes, Guwahati, seeking to raise a demand for payment of differential tax of 8.5 per cent on the ground that the "potato chips" manufactured by the petitioner-company are classifiable under the residuary item included in the Fifth Schedule to the Act. In these circumstances, the petitioner-company filed an application u/s 105 of the Act before the Commissioner of Taxes for determination of the classification of the "potato chips" manufactured and sold by it. The learned Commissioner having taken a view adverse to the petitioner-company and having held the "potato chips" manufactured and sold by it to be classifiable under Serial No. 1 of the Fifth Schedule to the Act and, therefore, liable to tax at the rate of 12.5 per cent, the instant revision petition has been filed by the petitioner-company u/s 81 of the Act.

5. We have heard Mr. C.S. Lodha, learned Counsel for the petitioner and Mr. D. Saikia, learned Standing Counsel, Finance, appearing on behalf of the respondents.

6. Entry 80 of Part A of the Second Schedule to the Act as originally enacted was in the following terms:

Processed or preserved vegetables and fruits.

7. With effect from August 8, 2005 to December 4, 2005 the aforesaid entry read as follows:

Processed or preserved fruits and vegetables excluding jam, jelly, pickle, fruit squash, paste, fruit drinks and fruit juice.

8. Thereafter, from December 5, 2005 to October 15, 2008 entry 80 was once again amended in the following terms:

Processed or preserved vegetables and fruits including fruit jam, jelly, pickle, fruit squash, paste, fruit drinks and fruit juice.

9. Once again with effect from October 16, 2008 the said entry was amended to read as follows:

Processed or preserved vegetables and fruits including fruit jams, jelly, pickles, fruit squash, paste, fruit drinks and fruit juice but excluding "potato chips", banana chips and cooked preparation of the vegetables and fruits.

10. Sri C.S. Lodha, learned Senior Counsel for the revision petitioner, apart from

contending that the huge volume of materials placed by the petitioner-company before the learned Commissioner in support of its contention that "potato chips" would be classifiable under entry 80 of Part A of the Second Schedule and not under residuary item included in the Fifth Schedule to the Act were ignored by the said authority as the same do not find any consideration in the impugned order, has also drawn the attention of the court to the amendments made in respect of the said entry. In this regard, the learned Counsel has pointed out that processed or preserved fruits and vegetables at one point of time specifically excluded jams, jelly, pickles, fruit squash, paste, fruit drinks and fruit juice which items were, however, included with effect from December 5, 2005. The definition of "processed or preserved fruit and vegetables", therefore, according to the learned counsel, became an inclusive definition taking within its compass all other species including "potato chips" belonging to the common genus of "processed vegetables". This, according to the learned counsel, has been clearly manifested by the specific exclusion of the "potato chips" from the purview of entry 80 with effect from October 16, 2008 while the said entry continued to include jam, jelly, pickles, etc. Sri Lodha, learned Senior Counsel for the petitioner, has further pointed out that if any particular item is classifiable under a specific entry in a Schedule, such item, or commodity must not be relegated to the residuary entry. The learned Counsel further contended that in several States the same product has been classified under the specific entry of the VAT Act in force in the said States either by the Revenue itself or under judicial/quasi-judicial orders. The learned Counsel has further contended that though an entry in a fiscal statute has to be usually understood according to the ordinary or dictionary meaning of the words, i.e., by adoption of the common parlance test, in situations where the application of such test would produce an absurd or inconsistent result or there are indications that a special meaning is attached to the particular words in the statute then the ordinary or dictionary meaning would not be applicable but the special meaning ascribed to the particular goods in the market should be allowed to prevail. In this regard, reliance has been placed by Sri Lodha, learned Counsel for the petitioner on a judgment of the apex court in *Collector of Central Excise, Kanpur v. Krishna Carbon Paper Co.* reported in [1989] 72 STC 280 : [1989] 1 SCC 150.

12. The learned Counsel for the petitioner has further pointed out that the Government of India, Ministry of Finance (Department of Revenue) by Circular No. 6/88 had issued instructions for the purpose of classification of potato wafers as preparations of vegetables and, therefore, as appropriately classifiable under Chapter 20 of the Central Excise Tariff Act, 1985. The learned Counsel has further pointed out that the Ministry of Food Processing had also issued instructions that "potato chips" should be treated as a vegetable-based product. In this regard, the attention of the court has been specifically drawn to the specific Government Notifications issued. Relying on a judgment of the apex court in *State of Tamil Nadu v. Mahi Traders* reported in [1989] 73 STC 228 and that of the Andhra Pradesh High Court in *Concap Capacitors v. State of Andhra*

Pradesh [2006] 148 STC 398 the learned Counsel has submitted that the view taken by the Government of India with regard to classification of a product should act as a sufficient basis for the court to hold in a similar manner.

13. Lastly, the learned Counsel for the petitioner has contended that the definition of "processed vegetable or fruit" in entry 80 of Part A of the Second Schedule to the Act is an inclusive definition and jam, jelly, pickles, fruit juices, etc., having been included as items of processed vegetables or fruits, as may be, there is no reason why the inclusive definition should not cover "potato chips" as an item of processed vegetable. The purport and effect of an inclusive definition has also been sought to be explained by the learned Counsel on the basis of several decisions of the apex court, specific details of which, however, need not be noticed. The learned Counsel for the petitioner has also relied on a recent decision of the apex court in *Mauri Yeast India Pvt. Ltd. Vs. State of U.P. and Another*, to contend that the present case even if there is any doubt as to which of the entries would attract the particular product in question, the benefit of such doubt, on the ratio of the law laid down by the apex court in the above case, should go in favour of the assessee, i.e., the revision petitioner herein.

14. The arguments advanced on behalf of the petitioner have been vehemently resisted by Sri D. Saikia, learned Counsel appearing for the respondents. Placing before the court certain literature circulated by the petitioner on its web site, Sri Saikia has pointed out that it is the case of the petitioner that "potato chips" is a snack item and not a processed vegetable item. Sri Saikia has submitted that the process of preparation of "potato chips" is really a manufacturing process and the end-product is a new item which in the market is bought and sold as a snack item and not as a processed vegetable. Relying on a decision of the apex court in *Commissioner of Income Tax, Kerala Vs. Tara Agencies*, Sri Saikia has tried to demonstrate before the court what is involved in a process of manufacture and further to show that "potato chips" involved in the present case undergoes such a process. Relying on another judgment of the apex court in *Deputy Commissioner of Sales Tax (Law), Board of Revenue (Taxes), Ernakulam Vs. Pio Food Packers*, Sri Saikia has submitted that there is a vast difference of identity between the original commodity (potato) and the processed/manufactured item ("potato chips") and, therefore, the item processed or manufactured as "potato chips" does not retain its original identity. Relying on several other judgments of the apex court, i.e., *M/s. Saraswati Sugar Mills Vs. Haryana State Board* and others, , *Indo International Industries Vs. Commissioner of Sales Tax, Uttar Pradesh*, and *P.A. Thillai Chidambara Nadar Vs. Addl. Appellate Asstt. Commissioner, Madurai and Another*, Sri Saikia has submitted that in the absence of any definition of "processed vegetable" in the Act, the meaning of the said term must be understood by application of the common parlance test. Sri Saikia has further argued that "potato chips" in the market is understood by the consumers as a snack item and not as a vegetable item. There is no sale or purchase of "potato chips" as a vegetable product. In such circumstances, according to Sri Saikia, by application of the common parlance test, which is the

judicially approved test for determining the meaning of an item in a taxing statute in the absence of any specific definition, "potato chips" would be classifiable not as a processed vegetable item under entry 80 of Part A of the Second Schedule. Rather, the said item would be more appropriately classifiable under the residuary item contained in serial No. 1 of the Fifth Schedule to the Act.

15. Sri Saikia has sought to counter the contention advanced on behalf of the petitioner with regard to the inclusive definition of the expression "processed vegetable" by contending that the reference to jams, jelly, pickle, etc., is illustrative and comprehensive to include only the items specifically mentioned and no other item. In this regard, reliance has been placed on a judgment of the apex court in the case of Reserve Bank of India Vs. Peerless General Finance and Investment Co. Ltd. and Others, Sri Saikia has further submitted, that the specific exclusion of "potato chips" from entry 80 with effect from October 16, 2008 is merely clarificatory. According to Sri Saikia, the amendment of entry 80 to the above effect has made it explicit what was always implicit.

16. The rival submissions advanced on behalf of the parties have received our most anxious consideration.

17. The basic approach while dealing with claims and counter-claims of classification under the main and residuary item of tariff has been explained by the apex court in Dunlop India Ltd. and Madras Rubber Factory Ltd. Vs. Union of India (UOI) and Others, in the following manner:

...When an article is by all standards classifiable under a specific item in the tariff Schedule it would be against the very principle of classification to deny it the parentage and consign it to an orphanage of the residuary clause.

18. The aforesaid aspect of the matter, therefore, need not detain the court any further.

19. We have also read through the contents of entry 80 as originally enacted and the amendments made thereto from time to time. Originally entry 80 of Part A of Schedule II to the Act was to the following effect:

Processed or preserved vegetables and fruits.

20. With effect from August 8, 2005, specifically jam, jelly, pickle, fruit squash, paste, fruit drinks and fruit juice were excluded from the purview of the said entry. Again, with effect from December 5, 2005, jam, jelly, pickle, fruit squash, paste, fruit drinks and fruit juice were included within the purview of the aforesaid entry 80. With effect from October 16, 2008, while jam, jelly, pickles, fruit squash, paste, fruit drinks and fruit juice continued to remain included, but "potato chips", banana chips and cooked preparations of the vegetables and fruits were excluded. In Deepak Agro Solution Ltd. Vs. Commissioner of Customs, Maharashtra, the apex court after considering the effect of inclusion and exclusion of items from the purview of specific entries in the Customs Tariff and Central Excise Tariff, laid down that "it is well-settled, what is not excluded

would be held to be included". The effect of inclusion of jam, jelly, pickle, etc., within the fold of entry 80 and the absence of any specific exclusion of "potato chips" from the purview of the said entry until October 16, 2008 would, therefore, express a clear legislative intent of inclusion of "potato chips" under entry 80.

21. 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.

22. The argument advanced by Sri Saikia, learned Counsel for the respondents, by placing reliance on the decision of the apex court in Reserve Bank of India Vs. Peerless General Finance and Investment Co. Ltd. and Others, that in the present case the word "including" appearing in entry 80 was intended not to expand the meaning of processed vegetable or fruit and such expansion must be understood to be limited to the items specifically mentioned in the said entry 80, may now be considered. In the aforesaid case, the apex court laid down that the legislative resorts to the inclusive definition are made:

(1) to enlarge the meaning of words or phrases so as to take in the ordinary, popular and natural sense of the words and also the sense which the statute wishes to attribute to it,

(2) to include meanings about which there might be some dispute, or,

(3) to bring under one nomenclature all transactions possessing certain similar features but going under different names.

23. However, the apex court also laid down that "depending on the context, in the process of enlarging, the definition may even become exhaustive". The context in which the above view was expressed by the honourable Supreme Court must be understood to see whether the said view or logical extensions thereof can be made applicable to the present case. In Reserve Bank of India Vs. Peerless General Finance and Investment Co. Ltd. and Others, the apex court was considering as to whether the term "includes" appearing in Section 2(e) of the Prize Chits and Money Circulation Schemes (Banning) Act, 1978, could legitimately be understood to encompass within the expression "prize chit", an endowment scheme of the company so as to make the ban on prize chits

applicable to the endowment scheme. The apex court answered the aforesaid question in the negative by holding that an endowment scheme, which does not include any offer of prize money determined by luck and chance, cannot be brought within the expression "prize chit" by virtue of the inclusive definition. What is evident from a reading of the said judgment is that the word "includes" in that case was understood to include all species belonging to the same genus which is an essential principle of judicial interpretation of an inclusive definition. As already held, in the present case, when the items which are not ordinarily understood to be items of processed vegetable or fruit, i.e., jam, jelly, pickle, etc., are included within the definition of "processed fruit or vegetable", the other species of the same genus necessarily has to be understood to be included, particularly, in the absence of any specific exclusion.

24. Much arguments have been-advanced on behalf of the rival parties as to whether, in the present case, the words "processed vegetables or fruits" should be understood by application of the common parlance test, i.e., as to whether the words should be understood in the ordinary sense or the scientific or technical meaning of the said words should be applied. The numerous precedents cited by the learned Counsel for the parties on the point have received our due and anxious consideration. There can be no manner of doubt that "If a statute uses the ordinary words in every day use, such words should be construed according to their popular sense.. This rule was stated as early as 1831 by Lord Tenterden in *Attorney-General v. Winstanley* [1831] 2 Dow. & CI 302. Similarly, in *Grenfell v. Inland Revenue Commissioners* [1876] 1 Ex. D 242, 248, Pollock. B, observed, "that if a statute contains language which is capable of being construed in a popular sense such statute is not to be construed according to the strict or technical meaning of the language contained in it, but is to be construed in its popular sense, meaning of course, by the words "popular sense", that sense which people conversant with the subject-matter with which the statute is dealing would attribute to it". Commissioner of Sales Tax, Madhya Pradesh Vs. Jaswant Singh Charan Singh, . However, in *Collector of Central Excise, Kanpur v. Krishna Carbon Paper Co.*, the apex court after reiterating the aforesaid proposition hastened to add a note of caution to the effect that if it is discernible that an artificial definition is being given to the words or a special meaning is attached to such words, in such a situation, the ordinary or dictionary meaning would not be applicable and the special meaning must be allowed to prevail. The following observation of the apex court in the case of *Collector of Central Excise, Kanpur v. Krishna Carbon Paper Co.* reported in would succinctly sum up the situation : (page 289 of STC), (para 12 of SCC)

... But there is a word of caution that has to be borne in mind in this connection, the words must be understood in popular sense, that is to say, these must be confined to the words used in a particular statute and then if in respect of that particular items, an artificial definition is given in the sense that a special meaning is attached to particular words in the statute then the ordinary sense or dictionary meaning would not be applicable but the meaning of that type of

goods dealt with by that type of goods in that type of market, should be searched....

25. The law laid down by the apex court in *Collector of Central Excise, Kanpur v. Krishna Carbon Paper Co.*, therefore, has to be understood to mean that in the normal course the ordinary meaning according to the common parlance has to be ascribed but in a given case, if the situation so demands, a technical, scientific or special meaning that may be discernible may, have to be ascribed to the words used in the statute.

26. In the present case, the specific inclusion of items like jam, jelly, pickles, etc., which in common parlance are not understood to be items of processed vegetable or fruit, gives sufficient indication that processed vegetable or fruit appearing in entry 80 has been given a special or technical meaning as distinguished from the ordinary meaning. If a processed vegetable or fruit is to be understood in the ordinary way, none of the items specifically included in entry 80 could have been so included. That apart, the Government of India has understood "potato chips" to be a vegetable product for the purpose of classification under the Central Excise Tariff Act. Such understanding has also been reiterated by the Ministry of Food Processing. As held by the apex court in *State of Tamil Nadu v. Mahi Traders* [1989] 73 STC 228, at page 229, "Contemporaneous exposition by the administrative authorities is a very useful and relevant guide to the interpretation of the expressions used in a statute". Considering the above, we are of the view that the words "processed vegetables or fruits" appearing in entry 80 must be ascribed a fictional meaning to include items which in everyday use may not be vegetable or fruit items.

27. The net result of the above discussions leaves no doubt in our mind that "potato chips" manufactured and sold by the petitioner-company would fall under entry 80 of Part A of Schedule II to the Assam Value Added Tax Act, 2003, as contended by the petitioner and that the said item will not fall under the residuary item contained in serial No. 1 of the Fifth Schedule to the Act as claimed by the Revenue. Our above finding, naturally, has to be understood in the context of the provisions of the Act as it stood prior to the amendment to the Schedule to the Act made with effect from October 16, 2008.

28. The revision petition, therefore, is allowed. The impugned order dated September 10, 2007 passed by the learned Commissioner of Taxes, Government of Assam is set aside and quashed.