(2012) 02 MP CK 0053

In the Madhya Pradesh High Court

Case No : Writ Petition No. 1486 of 2009

Popular Sales (M/s) APPELLANT

Vs

State of M.P. and Others RESPONDENT

Date of Decision : 02-02-2012

Acts Referred:

Madhya Pradesh Commercial Tax Act, 1994 — Entry 11, Entry 41

Citation : (2012) ILR (MP) 733 : (2012) 3 MPLJ 584

Hon'ble Judges : Sushil Harkauli, Acting C.J.;Tarun Kumar Kaushal, J

Bench : Division Bench

Advocate : Sumit Nema with Mukesh Agrawal, for the Appellant; Vivek Agrawal, G.A. for the Respondent/State, for the Respondent

Judgement

Sushil Harkauli, Actg. C.J.

1. We have heard learned counsel for the parties.

In the earstwhile M.P. Commercial Tax Act 1994 the duties payable on various categories of item are prescribed in Schedule II. The relevant entries in question are Entry 41 and 49 of Part-Ill of Schedule II, these attract Commercial Tax at the rate of 12%. The entries read as follows.

41. Scents, perfumes, hair tonics, hair creams, hair oils, hair shampoo, depilatories, face creams, snows, lipstics, rougue, nail polish and other cosmetics including medicinal preparation thereof.

49. Tooth paste, tooth powder, hair oils, face powder, talcum powder, toilet soap, washing soap and other toilet articles including medicinal preparation thereof, combs, brushes, razors and razor blades.

(Emphasis supplied)

There is yet another entry which is relevant and which attracts only 8% Commercial Tax or Sales Tax which is Entry No. 11 of Part-IV of Schedule II, which reads as follows:

11. Drugs and medicines excluding those specified elsewhere in this Schedule.

2. In this bunch of writ petitions, there are four items in issue which are manufactured by the petitioners namely (1) Boro Natural, (2) Borosoft Cream, (3) Borosoft Lotion, (4) Dermicool Powder, and (5) Itch Guard Cream.

3. According to the contention of Commercial Tax Department, all these items are taxable under Entry 41 or in the alternative Entry 49 of Part-III of Schedule-II.

4. On the other hand, the manufacturer petitioner contends that these items are taxable under Entry 11 of Part-IV of the Schedule-II of MP. Commercial Tax Act, 1994.

5. All these matters were heard together. During the course of arguments the claim of the petitioner regarding Borosoft Lotion was abandoned on the ground that manufacturing of this item has stopped.

6. The learned counsel for the petitioners has conceded that Borosoft Natural and Borosoft Cream are items which can be used to treat specific medical conditions and can also be used otherwise by persons who are not suffering from any such medical problems, for enhancement of beauty, and therefore these items would be taxable under Entry 41 of Part-Ill of Schedule-II.

7. The learned counsel for the State has conceded that the item Itch Guard Cream is used only for treatment of certain medical conditions and cannot be used otherwise merely for cosmetic purposes and therefore this item would fall within the Entry 11 of Part-IV of Schedule-II.

8. This leaves us with the item called Dermicool Powder which is basically a powder to be used in cases of prickly heat. It is not disputed that the powder is scented and therefore could possibly be used as a substitute for talcum powder.

9. We have given due thought to the matter. The words in which Entries 41 and 49 of Part-III of Schedule-II have been drafted leaves little doubt that the words "including medicinal preparation thereof used along with the cosmetic items mentioned in the entries are intended to avoid evasion of tax by including some medical ingredients in cosmetic items in attempt to take them to Entry 11 of Part-IV which attracts mere 8% of tax. It is quite obvious that because of public sentiments, drugs and medicines have to carry a lower rate of tax as compared to cosmetics.

10. The words "including medicinal preparation thereof" in Entries 41 and 49 have therefore to be interpreted in that light and purpose.

11. In the above light, we are of the opinion that the test as to whether an item falls in Entry 41 or 49 or falls within the Entry 11 quoted above would be whether these items can be used as a cosmetic item for enhancement of the beauty of the body, irrespective of the specific medical problems which they claim to relieve or cure. If the item can be used only for treating specific medical

condition and not otherwise, it would not fall within the Entry 41 or 49. Further, if commonly the item is understood to be capable of use only to treat certain medical conditions and not otherwise, again it would not fall within the Entry 41 or 49. Prickly heat powders are normally used only for relieving prickly heat problem.

12. In fact in the case of Puma Ayurvedic Harbal (P) Ltd. vs. Commissioner, Central Excise, Nagpur reported in (2006) 45 STC 200, the Supreme Court was examining the difference between cosmetic and medical preparation, although in the context of central excise. In that decision the Supreme Court has referred to the decision reported in Muller and Phipps (India) Ltd. Vs. The Collector of Central Excise, Bombay-I, wherein Johnson Prickly Heat Powder was held to be medicinal because it was not ordinary talcum powder but was a powder to be used to treat the problem of prickly heat. The Supreme Court also cited the case reported in Manisha Pharma Plasto Pvt. Ltd.(M/s) Vs. Union of India, which was a case of NyciI Prickly Heat Powder which was also held not to be an ordinary powder but falling in the category of medicament.

13. We are also of the view that dermicool powder which is described as a prickly heat powder is also commonly understood to be of use in treating prickly problem and not as an ordinary talcum powder.

14. It is not the case of the State that the price of dermicool powder is substantially less than ordinary talcum powder, because of which common person may be tempted to use that scented powder as a substitute for ordinary talcum powder in place of ordinary talcum powder. If such stand had been taken then the manufacturer may have to show that the use of dermicool powder in conditions other than prickly heat could cause any medical problem.

15. Considering the all over facts and circumstances of the case, we are of the opinion that the item dermicool powder must be held to be a medicine taxable under Entry 11, and not a medicinal preparation of a cosmetic within the meaning of those words as used in Entry 41 or 49 quoted above.

16. Accordingly, all the impugned assessment orders will stand modified in respect of these 2 items namely (1) Dermicool Powder, and (2) Itch Guard Cream. The Assessing Officer will make consequential changes in the order. All these petitions are disposed of with the aforesaid directions.