
(2011) 07 GAU CK 0060
In the Gauhati High Court
Case No : Writ Petition (C) No. 6250 of 2007

Shalimar Chemical Works Limited	Vs	APPELLANT
State of Assam and Others		RESPONDENT

Date of Decision : 27-07-2011

Acts Referred:

Assam Value Added Tax Act, 2003 — Section 105

Citation : (2012) 1 GLD 8 : (2012) 50 VST 253

Hon'ble Judges : P.K. Musahary, J

Bench : Single Bench

Advocate : Ashok Saraf, Mr. D. Baruah and Ms. N. Haweli, for the Appellant;
K.N. Choudhary, Addl. A.G., Assam and Mr. R. Dubey, for the Respondent

Final Decision : Allowed

Judgement

P.K. Musahary, J.—Heard Dr. A.K. Saraf, learned senior counsel assisted by Mr. D. Baruah, learned counsel for the petitioner. Also heard Mr. K.N. Choudhury, learned Additional Advocate General, Assam for the respondents. The petitioner, claiming itself as a duly registered company under the Companies Act, 1956, having its registered office in Kolkata and Branch Office at several places including Guwahati, says inter alia, that it manufactures edible grade coconut oil and it is holding valid licence under the provisions of Prevention of Food Adulteration Act (in short, PFA Act). It says that its products meets all the requirements and standard of edible oil prescribed for BUREAU of Indian standard (hereinafter in short "Bureau"). Further says that the coconut oil manufactured by the petitioner company has passed the test conducted by the National Test House, Kolkata. The petitioner agrees that, its product under the Trade name "Shalimar Coconut Oil" falls within the taxing schedule prescribed under Entry No. 24(i) of 2nd Schedule to the Assam Value Added Taxes Act, 2003 (hereinafter referred to as "VAT Act" in short) without any ambiguity but the respondents No. 2 and 3 have suo moto transposed the entry of coconut oil into 5th Schedule by an order issued vide No. CST-48/2006/112 dated 11.10.2007 by

the Commissioner of Taxes, Assam and notice No. 12733 dated 16.11.2007 issued by the respondent No. 3, the Superintendent of Taxes, Guwahati, Unit-D. The aforesaid order dated 11.10.2007 (Annexure-VII) and notice dated 16.11.2007 (Annexure-VI) are under challenge in this writ petition.

2. The petitioner company as stated in the petition was registered "as a dealer within the meaning of Assam General Sales Tax Act, 1993 that stood repealed by enactment and subsequent Notification of the VAT Act and the petitioner is a duly registered company under the provisions of VAT Act and it has been assessed by the respondent No. 3. The petitioner company holds a licence under the Assam Trade Article (Licensing & Control) Order, 1982 (hereinafter referred to as "ATAO" in short). Over and above the petitioner company also holds a certificate under Form-4 issued by the Joint Director of Health Services, Guwahati for sale of "coconut oil" as a food grade edible article which is valid upto 31.3.2008.

3. Both edible and non-edible vegetable oil were initially taxable at the point of first and last sale in Assam vide Entry VII of Schedule IV to Assam General Sales Tax Act (hereinafter in short called as AGST, Act) with 4 + 4 paise in a rupee upto 5.10.1999. Thereafter the same was transferred to Schedule-II, Entry-IV at the rate refixed at 8 paise in rupee. It was reduced to 4 (four) paise w.e.f. 1.1.2000. Thereafter w.e.f. 1.1.2000 to 18.2.2002 all vegetable oil both edible and non-edible including Vanaspati vegetable oil or other edible oil including mustard oil and rapeseed oil, but excluding coconut oil became taxable at the first point of sale @ Rs. 12 paise a rupee. Thereafter all edible oils were listed as item No. 22(i) in the 2nd Schedule to the VAT Act, which is listed as goods taxable at 4% or 4 paise in a rupee w.e.f. 7.4.2005 till date. After enactment and implementation of VAT Act, the petitioner was calculating the VAT on coconut oil at the rate of 4 paise in a rupee as per Entry 24(i) of the VAT Act and similarly the petitioner was paying the tax and/or filed necessary return before the authorities under the VAT Act at the rate of 4 paise in a rupee.

4. There are 8(eight) schedules to the VAT Act. The first Schedule pertains to goods exempted from payment of tax. The 2nd Schedule with 3 (three) parts; (a), (b) and (c), pertains to different items chargeable to tax at the rate of 4%. We are concerned with this Schedule. The edible oils are placed at Entry No. 24(i) in part-A of the 2nd schedule. Schedule-IV pertains to list of goods taxable at the point of first sale in the State while 5th Schedule pertains to goods "All other goods not covered by 1st, 2nd, 3rd and 4th Schedule. We are also, thus, concerned with the 5th Schedule inasmuch as the coconut oil manufactured and marketed by the petitioner company is used mainly as hair oil and not as edible oil and it has been made taxable at the rate of 12.5% by issuing the impugned order dated 11.10.2007. Therefore, the issue involved in this case is whether coconut oil which is mainly and popularly used as hair oil and not as edible oil in Assam, would be taxable at the rate of 12.5 % under 5th Schedule to the VAT Act. In other words, whether the coconut edible oil manufactured by the petitioner-company in Assam would come under Entry 24(i) in part-A of the 2nd

Schedule to the VAT Act to be charged tax at the rate of 12.5%.

5. Dr. Saraf, learned senior counsel for the petitioner would submit that the impugned decision of the respondent-authorities in coming to a conclusion that the coconut oil in the State of Assam is not used for cooking but it is mainly used for hair oil and it cannot be treated as edible oil, is as much presumptive as unreasonable and baseless inasmuch as there was no survey undertaken before coming to such conclusion which was required to be done before any decision is taken. Such unilateral decision was taken without affording any opportunity of hearing to the petitioner, which is liable to be interfered with in judicial review. The burden lies heavily on the State to prove that the coconut oil is used mainly as hair oil and not as edible oil in Assam. There is no finding of the fact that particular class of persons who use coconut oil as cooking medium do not reside in the State of Assam. So also there is no finding of fact that none of the coconut oil sold by the petitioner has ever been used for edible purpose and therefore, there is no basis to hold that coconut oil manufactured by the petitioner is not an edible oil. Without discharging the said burden by way of organizing survey or conducting an enquiry, any decision in this regard without issuing any notice and providing an opportunity of hearing, cannot be acceptable and sustainable under the law. According to Dr. Saraf, on the question of enquiry and burden of proof by the State whether a particular item is to be included in a taxable item, the position has been explained and settled by the Apex Court in several cases. In support of this he would refer to H.P.L. Chemicals Limited Vs. Commissioner of Central Excise, Chandigarh, . He further submits that there is no evidence on record that the petitioner marketed its product as a non-edible oil. There is also no material on record that the product literature or label ever indicated that the coconut oil manufactured by the petitioner is not edible, nor are there any material on record that the coconut oil sold by the petitioner was perfumed and was not fit for edible purpose. There is also no material on record before the respondent No. 2 to justify a different categorization of purchase merely because the coconut oil manufactured by the petitioner is susceptible to multiple uses. The action of the respondents in changing the category or re-classification of petitioner's coconut oil from Entry 24(i) under 2nd Schedule to the 5th Schedule of the VAT Act is arbitrary, unreasonable and hit by principles of Wednesbury's test on unreasonableness as no person trained in law would reasonably interpret the food grade coconut oil manufactured by the petitioner under a valid licence to fall within the 5th Schedule to the VAT Act without any material on record by ignoring the settled principle of law.

6. Seriously countering the submissions made by the learned counsel for the petitioner, Mr. K.N. Choudhury, learned Additional Advocate General, Assam would submit that the conclusion arrived at by the respondent-authorities that coconut oil in Assam is not used for cooking and it is mostly used as hair oil is based on market survey and as per the commercial parlance or market test. For application of common parlance and commercial parlance test in respect of a particular item, he would refer us to Commissioner of Trade Tax, U.P. Vs.

Associated Distributors Ltd., , wherein it is held that the Hindi word "Mithai" as understood in the State of U.P. would not cover bubblegum inasmuch as bubblegum is an unclassified item taxable @ 10%. The reason was that the word "mithai" has a definite connotation and it can be said with reasonable amount of certainty that people in this country do not consider toffee as Mithai. Similarly in the case of coconut oil produced and sold in Assam, when a person asks a salesman in a shop for coconut oil, he would instantly bring and show coconut oil used as hair oil and not coconut oil used for cooking. Therefore, according to Mr. Choudhury, learned Addl. Advocate General, the coconut oil both in common and commercial parlance would mean only coconut hair oil as the people in the State of Assam mostly and popularly use the coconut oil as hair oil. He would then refer to another case in SSE Pvt. Ltd. v. State of Assam & Others reported in (2005) 2 GLR 468 on interpretation of taxing statute, wherein it has been held that for classification of a particular product for the purpose of levy of tax, if the product or commodity is not defined by the Statute, the principle of common parlance test must be adopted to avoid technical, scientific and dictionary meaning. With the support from the decision in the said case, it is submitted that the common parlance principle has been rightly applied to the present case and there is no infirmity or legal wrong committed by the respondent-authorities in making coconut edible oil produced and marketed by the petitioner taxable at the rate of 12.5% under 5th Schedule to the VAT Act. The petitioner may manufacture and sell edible coconut oil but it is not popularly used as medium of cooking in the State of Assam and this is the reason why it was made taxable at 12.5 % under the Assam General Sales Tax Act (AGST in short). Thereafter the VAT Act came into force under which edible oil was listed as item No. 24(i) in the 2nd Schedule to the said Act which was made taxable at 4% w.e.f. 7.4.2005. But the hair oil like coconut oil not being a product covered under Schedule No. 1, 2, 3 and 4, it has been made taxable at 12.5% under the 5th Schedule as a residuary item. He further submits that issuing of prior notice as claimed by the petitioner is not necessary inasmuch as the petitioner was never in the picture in the whole process and if the petitioner was aggrieved by the issuance of clarification dated 11.10.2007, which was already circulated in the official Website for information of all concerned, it could have filed a review petition u/s 105 of the VAT Act for appropriate remedy but it did not prefer to do so, and therefore, the question of giving opportunity of hearing to the petitioner does not arise and it cannot be claimed as a matter of right.

7. We have carefully gone through the pleadings of the parties. We find that there is no dispute as regards the status of the petitioner as a company, manufacturer and trader of coconut oil in the State of Assam under valid licence/permit etc., issued by competent authorities. There is no dispute in regard to the fact that the petitioner is manufacturing/producing/marketing both hair oil and edible oil as per grade specified by the authorities concerned. What is in dispute is that the coconut oil is not popularly used by the people in Assam as edible oil. It is rather popularly used as hair oil only. We are aware that edible oil means oil

for being used as medium of cooking. Coconut is undoubtedly a main medium of cooking, mainly in the southern States of India. In the rest of the country, including Assam, it is not usually/popularly used as edible or medium of cooking. It means that in common parlance, the coconut oil is not accepted as edible oil in Assam. The respondent-authorities may be right in excluding the coconut edible oil from Entry 24(i) of Schedule-2 and making it chargeable under 5th Schedule as residuary item levying-tax at @ 12.5%.

8. Now coming to the meaning of a particular item under the commercial parlance there is a need for further examination in the context of use of a particular item and treatment given under a statute for charging tax on it, The meaning of "Mithai" as explained in the "Associated Distributors" case (supra) relates to edible items namely Mithai i.e. sweet and bubblegum i.e. Toffee. Toffee is considered as sweetmeat but bubblegum is not a sweetmeat like the toffee. It is an unclassified goods taxable under the law in the State of Uttar Pradesh. In *Chittaranjan Saha v. State of Tripura* reported in (1990) 079 STC 0051 , a Division Bench of this Court held that akin to the common parlance test is trade parlance or commercial parlance test. It was held further that according to this test items in taxing statute like sale tax, custom etc. should be judged and analysed on the basis of how these expressions are used in the trade or industry or in the market or, in other words how these are dealt by the common people, who deal in them. This principle was applied earlier in *Commissioner of Income Tax, Andhra Pradesh Vs. Taj Mahal Hotel, Secunderabad*, . Referring to various decisions, the Division Bench came to a conclusion that the common parlance or commercial parlance test scheme is a generally accepted test. The Courts have freedom to apply some other tests also to interpret items under the taxing statutes. One such test is popularly known as common sense test or "common sense rule of interpretation" as referred to by the Supreme Court in *Tungabhadra Industries Ltd. v. Commercial Tax Officer, Karnool* (1960) 11 STC 827. It has also mentioned about "user test" for interpreting items of taxing statute. We are not really concerned with all those tests. The matter involves simple test under the common parlance and commercial/trade test. In common parlance edible oil would primarily mean mustered oil, rape seed, vanaspati etc in the mainland and also coconut oil in the southern part of India. It is correct to say that in common parlance coconut oil is primarily manufactured for hair oil. Edible oil from coconut is also produced for cooking purpose. Both coconut hair oil as well as coconut edible oil can be produced from the coconut fruits. They are packed in the container indicating use of the product; either for hair oil or edible oil. They are distinct products for separate usages. There is no complaint to the effect that the petitioner company is defaulting in displaying the purpose or use of the product in the label pasted to the containers or packets. There is no difficulty for the common people in making out two different coconut oils, namely hair oil and coconut edible oil. There is no complaint received by the authorities that the common people have difficulty in identifying the coconut hair oil and vegetable oil sold in the market. It is, therefore, established that in common parlance

edible oil is produced from coconut and sold in the country including the State of Assam.

9. Thus, it appears that there are various tests applied for determining the meaning or connotation of words and expressions describing an article in taxing statutes. The mostly used tests are-common sense or popular test, trader or commercial parlance test, scientific and technical meaning test and user test. Some time dictionary meaning is also pressed into service for interpreting the items. For the purpose of deciding the present case it is not necessary to deal with application of the said tests. However, we feel it apt to bear in mind that the Supreme Court in other cases held that user test is logical but inconclusive. Similarly, use of dictionary meaning in interpreting an item in taxing statute is not considered relevant in all cases. A Division Bench of this Court had an occasion to deal with the application of the aforesaid tests in details by referring to various decisions of the Supreme Court. In this context, we are referring ourselves to Chitta Ranjan Saha (supra). The settled position of law has been narrated in paragraph 15 of the judgment which is reproduced below :

15. The principles laid down by the Courts in various decisions discussed above can be summarized as follows :

Where no definition is provided in the statute for ascertaining the correct meaning of a fiscal entry the same should be as understood in common parlance or trade or commercial parlance. Such words must be understood in their popular sense. The strict or technical meaning or the dictionary meaning of the entry is not to be resorted to. The nomenclature given by the parties to the word or expression is not determinative or conclusive of the nature of the goods. The same will have to be determined by application of the well-settled rules or principles of interpretation which have been referred to as "common parlance" rule, "trade or commercial parlance" rule, "common sense rule of interpretation" and "user test". The application of the principles will again depend on the facts and circumstances of each case. No test or tests can be said to be validly applicable to all cases. There may be cases where the interpretation may be tested by applying more than one rule of interpretation as has been done by the Courts in certain cases.

10. One thing is very clear in this case. The words "hair oil" and "edible oil" do not involve technical or scientific interpretation. They are as simple as clear by themselves. In simple English hair oil means scented oil for dressing the hair. Edible means fit to be eaten. Therefore, edible oil unmistakably means oil fit for cooking meals or food items for human consumption. A hair oil would, therefore, always signify and mean oil used for nourishing hair that cannot be used for cooking meals. Similarly the edible oil would never mean oil used for nourishment of hair. It would only mean oil used for cooking meal. The users know the utility of hair oil and edible oil. The words "hair" and "edible" are determinative of the usages of coconut hair oil and coconut edible oil. The result is conclusive in the sense that these two words are capable of clearly informing

the users as to which oil is meant for dressing the hair and preparing the food items. We are, therefore, firm in our opinion that dictionary meaning and user test could safely be used in the present case for interpreting the statutory meaning of coconut hair oil and coconut edible oil although they may not be applicable to other cases. Therefore the test as applied to interpretation of "Mithai" in Associated Distributors case (supra) has no application to the present case. The meaning of "Mithai" as explained in the said case relates to edible items only that is "Mithai" not the sweetmeat or bubblegum i.e. toffee.

11. In the modern days people like to have different food items prepared by different media of cooking. Food items prepared in coconut oil is no exception. People from different parts of India, including southern region, out of employment, business, trade and other avocations, come to Assam. Many people from southern region have come and settled in Assam for whom there is a popular demand for coconut edible oil. It will be just a denial of reality if one makes a superficial observation that only coconut hair oil is used and edible coconut oil is not at all used or sold in Assam.

12. Entry in 24(i) under 2nd Schedule to the VAT Act refers to edible oil. There is no specifications of edible oil made of mustered oil, rape-seed, sunflower or coconut. The item in the said Entry requires fulfillment of test and standard set by the authorities for edible oils. The authorities should not be concerned with whether products edible oil made of coconut is popular amongst the people or in the market. Legally speaking one necessary licence for production and marketing of a particular item or product is issued, the presumption would follow that there is demand for such item or product in the market. In such cases "user test is applied" for charging a particular item under the tax statute. But the Supreme Court in *M/s. Mukesh Kumar Agarwal and Company v. State of M.P. and Others* 1988 (Supp) SCC 232, held that the particular use to which an article can be applied in the hands of a special consumer is not determinative of the nature of the goods. Even as the description of the goods by the authorities of a department who called them varyingly under different names is not determinative of the nature of the goods. It was, therefore, held that "user test is logical; but is inconclusive". In the present case for the purpose of determining chargeability of the coconut edible oil under the statute, we see no reason to bring coconut edible oil manufactured and marketed by the petitioner to the fold of edible oils under Entry 24(i) in the 2nd Schedule to the VAT Act which has been made taxable at the rate of 4%.

13. We take note that the parties have different views contradictory to each other. In respect of classification of coconut edible oil manufactured by it, the petitioner, on the basis of test under the commercial/trade parlance, claims that the coconut edible oil is popularly used amongst a section of people in the State and so it can be included in item 24(i) and taxed @ 4% as prescribed in 2nd Schedule to VAT Act. On the other hand, the respondent-authorities have taken a reverse view based mainly on common parlance test without any acceptable

report or material to support their claim that the coconut edible oil in the State of Assam is not used for cooking purpose and hence it cannot be treated as edible oil as it is mainly used as hair oil. We are not prepared to accept this view of the Govt. It is not really an out come of any common parlance test but an out come of guess work without any proximity to the reality in the present developing society in the State of Assam. Otherwise also it is the settled position of law that if two views are possible regarding classification of goods, the benefit must go to the tax payers. This has been pronounced in other decisions of the Supreme Court which have been followed by this Court in Chitta Ranjan Saha's case (supra), wherein, following the said principles of law it has been observed that if a tax payer seeks advantage, which was not intended to by the Legislature but to which he was entitled one consideration of statute, he must be given that advantage. We see a similar situation in the present case also. The statute namely the VAT Act never intended that coconut edible oil should not be included on would not come under the fold of edible oils in Entry No. 24(i) of the 2nd Schedule and thereby the manufacturers/traders who are tax payers would not be given the benefit of rate of tax i.e. @ 4% as prescribed if the 2nd Schedule. In the State of Rajasthan, a similar question arose before the Jaipur Bench of Rajasthan High Court in Assistant Commissioner, Circle-E, Commercial Taxation Department v. Merico Industries Ltd. shopping center reported in 2006 15 Tax Update 160 (Rajasthan High Court). The question of law involved in that case was whether "Parachute 110 coconut" sold by the assessee during the relevant period would be taxable at the rate of 4% under Entry "all kinds of edible oil including edible coconut oil whether refined or filtered" or whether it would be taxable at the rate of 12 % under entry relating to "perfumery" which includes, "all types of hair oils including refined or filtered coconut oil". In the said case it was held that it is not in dispute that where the bona fide doubt exists as to interpretation between two competing industries, the benefit would tilt towards assessee and not in favour of the revenue to apply particular rate of tax to the commodity in question. It has been observed therein that where there is no dispute to the fact that "Parachute 100% pure coconut oil is sold with the prescription edible oil on the packing bottles by the assessee, the mere fact that it could also be used as hair oil by some consumers, which possibility cannot be ruled out, is not sufficient to exclude it from the category of edible oil. We are tempted to agree with the aforesaid observations and come to a conclusion in respect of the present case, that mere fact that majority of people in Assam do not use coconut oil for cooking purpose or the fact that coconut oil is being used popularly as hair oil would not create any legal bar to include the coconut oil in Entry 24(i) of 2nd Schedule to the VAT Act and in giving the benefit of payment of lesser tax provided in the said schedule. The outcome of the above discussions leaves no manner of doubt in our mind that the coconut edible oil manufactured and marketed by the petitioner company would come to the fold of edible oil under Entry 24(i) of part-I of 2nd Schedule to the VAT Act which is taxable @ 4% as contended by the petitioner and the said item would not fall under residuary item contained in SI. No. 1 of the 5th Schedule to the said Act as claimed by the

respondent-Revenue authorities. We, thus, hold that the petitioner company is liable to tax @ 4% under the provision of 2nd Schedule to the Act and not 12.5% prescribed under 5th Schedule. We set aside and quash the impugned orders dated 11.10.2007 and 16.11.2007 (Annexure-VII and VI respectively). Writ petition accordingly stands allowed. Parties are directed to bear their respective costs.