
(2011) 10 UK CK 0005

In the Uttarakhand High Court

Case No : Commercial Tax Revision No. 55 of 2011

Shriya Enterprises

APPELLANT

Vs

Commissioner, Commercial Taxes, Uttarakhand

RESPONDENT

Date of Decision : 20-10-2011

Acts Referred:

Central Sales Tax Act, 1956 — Section 14, 15
Uttarakhand Value Added Tax Act, 2005 — Section 55

Citation : (2012) 51 VST 413

Hon'ble Judges : Tarun Agarwala, Acting C.J.; V.K. Bist, J

Bench : Division Bench

Advocate : Bharat Ji Agrawal, Assisted by Ashish Joshi, for the Appellant; Sudhir Kumar, brief holder, for the Respondent

Judgement

Tarun Agarwala Actg. C.J.

1. Heard Mr. Bharat Ji Agarwal, the learned senior counsel duly assisted by Mr. Ashish Joshi, the learned counsel for the revisionist and Mr. Sudhir Kumar, the learned brief holder for the respondent-Department. The present revision relates to assessment year 2006-07 under the Uttaranchal Value Added Tax Act, 2005 (hereinafter referred to as, "the Act"). The revisionist is a registered dealer under the Act and had purchased potato chips/potato wafers from M/s. Pepsico India Holdings Pvt. Ltd. According to the revisionist, the selling registered dealer, namely, Pepsico India Holdings Pvt. Ltd., had been subjected to tax on the sale of potato chips while selling it to the revisionist at four per cent. The assessing authority, while passing the assessment order, accepted the books of account of the revisionist, including the purchases made by the revisionist but, instead of levying the tax on the sale of potato chips made by the revisionist at four per cent, has levied it at 12.5 per cent.

2. According to the revisionist, the tax could have only been levied at four per cent and not at 12.5 per cent. The revisionist, being aggrieved, filed an appeal before the Joint Commissioner (Appeals), Commercial Tax, Dehra-dun, which was

dismissed by an order dated November 19, 2010. The Joint Commissioner (Appeals) held that the potato chips was not covered by entry No. 6 of Schedule 11(B) of the Act and was consequently liable to tax at 12.5 per cent. The revisionist, being aggrieved, filed a second appeal u/s 53 of the Act before the Commercial Tax Tribunal, Dehra-dun, which was also dismissed by an order dated May 9, 2011. The revisionist, being aggrieved by the aforesaid orders, has filed the present revision u/s 55 of the Act.

3. The question, which has to be decided in the present revision is, whether potato chips is a processed vegetable or not, and consequently liable to be taxed at four per cent or at 12.5 per cent.

4. u/s 3 of the Act, the incidence of tax is levied and charged on every sale made by a dealer or a person. The rate of tax is specified u/s 4 of the Act. The relevant provisions of section 4 of the Act is quoted hereunder :

4. Rate of tax.-(1) The tax payable by a dealer under this Act shall be levied on his taxable turnover at such rates as may be prescribed in Schedules under sub-section (2), but not exceeding-

(a) the maximum rate for the time being specified in section 15 of Central Sales Tax Act, 1956, in respect of declared goods, and

(b) fifty per cent in respect of goods other than the goods referred to in clause (a) above :

Provided that in case of transfer of the right to use any goods, the rate of tax shall not exceed twenty per cent in respect of goods other than the goods referred to in clause (a) above.

(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 respect of goods specified in Schedule 11(A)-1 per cent

(b) In respect of goods specified in Schedule 11(B)-4 per cent

(c) In respect of goods specified in Schedule 11(C)-at the rate specified therein

(d) In respect of goods other than those included 12.5 per cent;

(ii) At the point of sale by manufacturer or sale by importer in respect of special category goods specified in Schedule III-at the rate specified therein.

5. A perusal of section 4(2)(b)(i)(b) and (d) of the Act would indicate that for goods specified in Schedule 11(B), a dealer would be liable to pay tax on his taxable turnover at four per cent and in respect of goods, which have not been

specified in any of the Schedule, the dealer would be liable to pay tax on his taxable turnover at 12,5 per cent. Entry No. 6 of Schedule 11(B) of the Act is relevant for the purpose of this case and is quoted hereunder:

Schedule II(B)

(See sub-clause (i) of clause (b) of sub-section (2) of section 4 of the Uttaranchal Value Added Tax Act, 2005)

Tax shall be payable on the goods specified in this Schedule at every point of sale at the rate of four per cent.

Sl. No.

Description of Goods

1 to 5, 6.

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

6. A perusal of entry No. 6 of Schedule II(B) of the Act indicates that all processed and preserved vegetables would be taxed at four per cent. According to the revisionist, potato chips is nothing but a preserved vegetable. The learned counsel submitted that potato is a vegetable, which after processing is called a potato chip. According to the revisionist, potato chips belongs to the common genus of processed vegetable and, in common parlance, potato chips is also a vegetable product.

7. On the other hand, the contention of the respondent-Department is, that potato chips is not a processed vegetable, but is a snack item. The process of preparation of potato chips is, in fact, a manufacturing process and the end-product, i.e., potato chips is a new item, which in the market is treated as a snack item and not as a processed vegetable. The contention of the respondent is, that the identity of the potato changes and, in common parlance, potato chips cannot and could not be classified as a processed vegetable.

8. From a perusal of section 4(2)(b) of the Act, it is clear that in respect of goods specified in Schedule II(B), the tax would be levied at four per cent, otherwise, it would be placed in the residuary category and would be charged at 12.5 per cent.

9. In M/s. Bharat Forge and Press Industries (P) Ltd. Vs. Collector of Central Excise, Baroda, Gujarat, , the Supreme Court held that if there is a conflict between two entries, one leading to an opinion that it comes within the purview of tariff entry and another the residuary entry, the former should be preferred. The Supreme Court further held (pages 415 and 416 in 84 STC) :

4. The question before us is whether the Department is right in claiming that the items in question are dutiable under tariff entry No. 68. This, as mentioned already, is the residuary entry and only such goods as cannot be brought under

the various specific entries in the tariff should be attempted to be brought under the residuary entry. In other words, unless the Department can establish that the goods in question can by no conceivable process of reasoning be brought under any of the tariff items, resort cannot be had to the residuary item...

10. Similar view was held by the Supreme Court in *H.P.L. Chemicals Limited Vs. Commissioner of Central Excise, Chandigarh*, wherein it was held (page 521 in 6 RC) :

31. It was submitted by the learned senior counsel appearing for the Revenue that the goods were classifiable under heading 38.23 (now 38.24) as "residual products of the chemical or allied industries, not elsewhere specified or included" which was the last item covered by heading 38.23. The said heading 38.23 is only a residuary heading covering residual product of chemical or allied industries "not elsewhere specified or included". In the present case since the goods were covered by a specific heading, i.e., heading 25.01, the same cannot be classified under the residuary heading at all. This position is clearly laid down in rule 3(a) of the Interpretative Rules set out above. As per the said interpretative rule 3(a), the heading which provides the most specific description shall be preferred to the heading providing a more general description. This position is also well-settled by a number of judgments of this court. Reference may be made to *M/s. Bharat Forge and Press Industries (P) Ltd. Vs. Collector of Central Excise, Baroda, Gujarat*,

11. Similar view was reiterated in *Mauri Yeast India Pvt. Ltd. Vs. State of U.P. and Another*, .

12. In the light of the aforesaid, unless the Department can establish that the goods in question can by no conceivable process of reasoning be brought under any of the tariff items, resort cannot be had to the residuary category and if there is a conflict between entries, then, the residuary category should not be taken into consideration.

13. A similar matter came up before the Gauhati High Court in *Pepsico India Holdings Pvt. Ltd. v. State of Assam* (2009) 25 VST 41 (Gau.). A Division Bench of the Gauhati High Court, by the judgment dated April 28, 2009, held that the sale of potato chips made by Pepsico India Holding Pvt. Ltd. is covered by entry 80 of Part A of Schedule II to the Assam Value Added Tax Act, 2003 which provided for processed or preserved fruits and vegetables and that the entry would take within its compass potato chips being a processed vegetable.

14. Similar view was held by the Madras High Court in its judgment dated November 10, 2009 passed in *Pepsico India Holdings Pvt. Ltd. v. Commissioner of Commercial Taxes* (2010) 29 VST 214 (Mad), wherein the court held that the Pepsico India Holdings Pvt. Ltd. cannot be taxed under the residuary entry.

15. A Division Bench of the Punjab and Haryana High Court in *Pepsico India Holdings (P.) Ltd. Vs. State of Punjab and Another*, also held that potato chips is,

covered by the entry processed and preserved vegetable. The court held that potato, which is admittedly a vegetable after processing, becomes a potato chip and thus a potato chip can only be treated as a processed vegetable.

16. The learned counsel for the respondent-Department has heavily relied upon a decision of the Himachal Pradesh High Court in the matter of *Pepsico India Holdings Pvt. Ltd. v. Assessing Authority-I* (2010) 36 VST 563 (HP) decided on September 9, 2010 wherein the court held that potato chips cannot come under the classification of processed vegetable under the Himachal Pradesh Value Added Tax Act, 2005. The court further held that the entries under Schedule (B) of the goods exempted from tax and under Schedule (A) relating to taxable goods at four per cent are different and distinct from the entries in the respective State Acts of Assam, Madras, and Punjab and Haryana and consequently, the judgments given by the High Court of Gauhati, Madras, Punjab and Haryana are distinguishable. The Division Bench of the Himachal Pradesh High Court however, found that potato chips was a processed form of potato and that potato was a vegetable and by processing of slicing, frying and spicing the potato chips did not cease to be a vegetable. The Division Bench however held that the Legislature has conspicuously left out any form of potato processing or processed potato, under Part II, Schedule A to be taxed at four per cent, though potato was exempted from tax under Schedule B.

17. The Grolier Encyclopedia of Knowledge defines the word "potato" as an edible tuber that grows at the end of an underground stem of the plant and is a vegetable. The encyclopedia further states about potato as under :

They are cooked fresh and can also be frozen or dried. They are processed into flour, starch, and alcohol and are used as fodder, especially in Europe. In the United States, annual per-capital consumption is 19 kg (42 lb) of fresh potatoes and 13 kg (30 lb) of processed potatoes, such as frozen French fries and potato chips.

18. The New Encyclopedia Britannica, Volume 19, 15th Edition classifies vegetables on the basis of parts of the plant, such as, root, stem, tuber, i.e., used for food. Potato is a tuber and states about potatoes as under :

Potato. Potatoes should be smooth, shallow-eyed, and clean. Varieties differ as to shape, size, colour of skin, and cooking qualities. Suitability for processing requires such qualities as high dry matter content, good texture and colour, low sugar content, high degree of maturity, and low peeling loss. In the second half of the 20th century, both institutional eating establishments and homemakers used potatoes in various processed forms, particularly frozen French-fried and dehydrated, or instant, mashed types. Potato chips have long been established as a major processed product. Instant mashed potato, in both potato granules and potato flake form, sliced and diced potato, and potato flour comprises the principal dehydrated products now in commercial production. One of the principal uses for dehydrated potato dice is as an ingredient in the manufacture of canned

meat products.

19. The Ministry of Food Processing Industry has understood processing of potato wafers or chips as a vegetable processing industry. Further, the Government of India has understood potato chips to be a vegetable product for the purpose of classification under the Central Excise Tariff Act.

20. In Deputy Commissioner of Commercial Taxes, Tiruchirapalli Division Vs. Hameed Trading Company, , it was held that contemporaneous exposition by the administrative authority is very useful and a relevant guide to the interpretation of the expression used in a statute.

21. In the light of the aforesaid, it cannot be disputed that potato is a vegetable after going through the process of slicing, frying and spicing, potato chips does not cease to be a vegetable. It is irrelevant as to whether it becomes a snack item or not. A processed vegetable can also be a snack item, but then it does not take the snack item outside the entry of processed vegetables. The characteristics of the potato remains the same and if, by processing potato, it becomes a potato chip, it still remains a processed vegetable and, consequently, will be taxed at four per cent under Schedule II(B) of the Act.

22. There is another aspect of the matter. One of the essential principles of judicial interpretation is whether the definition of the entry is inclusive or exclusive, which in turn indicates the legislative intent. In Deepak Agro Solution Ltd. Vs. Commissioner of Customs, Maharashtra, held :

17. It is well-settled what is not excluded would be held to be included. Within the category of sulphur, sulphur recovered as by product in the process of refinement of crude oil also finds place.

18. Chapter Note 1 of Chapter 25 starts with the words "except where their context or Note 4 to this Chapter otherwise requires". It is, therefore, difficult to hold that the headings of the Chapter would cover only the products which are in the crude state or comes within the purview of other activities contained therein. Interpretation of the said Note will depend upon the context in which the entries have been worded. If an entry is clearly worded and is broad in character, the same would lead to the conclusion that the context otherwise required.

19. An entry is to be given its ordinary meaning. If any goods fit in within one entry, the same for any purpose would not be held to be included in the other and in particular the residuary.

23. In the light of the aforesaid, the court finds from a reading of entry No. 6 of Schedule II(B) of the Act to be an inclusive entry. The use of word "all" and "including" makes it apparently clear that it is an inclusive entry. The effect of the words "all" and the words "including fruit jams, jellies, fruit squash, paste, fruit drinks and fruit juices and achar (whether in sealed containers or otherwise)" under entry No. 6 of Schedule II(B) of the Act and the absence of any exclusion of potato chips within the said entry gives a clear legislative intent

of inclusion of potato chips under entry No. 6 of Schedule II(B). To support this view of ours, the court finds that entries 10, 32, 40, 101 and 114 specifically excludes a particular product from being taxable at four per cent under Schedule II(B). For facility, the said entries are quoted hereunder :

10. Aluminium, aluminium alloy, their products (excluding extrusions).

32. Coir and coir products excluding coir mattress.

40. Declared goods as specified in section 14 of the Central Sales Tax Act, 1956 except coarse gain.

101. Silk fabrics excluding handloom silk unless covered by additional excise duty.

114. Toys excluding electronic toys.

24. A perusal of the aforesaid entries gives a clear indication that some of the products have been specifically excluded and, as held by the Supreme Court in *Deepak Agro Solution Ltd. Vs. Commissioner of Customs, Maharashtra*, , what is not excluded would be held to be included and, consequently, the court is of the opinion that potato chips would be covered under the processed vegetable and is covered by entry No. 6 of Schedule II(B) of the Act. The court further finds that when potato undergoes the process of slicing, frying and spicing, it does not lose the characteristics of a potato and a new product is not manufactured. It still remains a vegetable and, consequently, in our opinion, potato chips is a processed vegetable.

25. In *Tungabhadra Industries Ltd. Vs. The Commercial Tax Officer, Kurnool*, , the question for consideration was as to whether hardened or hydrogenated groundnut oil (commonly called vanaspati) continues to be called "groundnut oil". The court in order to find out whether hardened or hydrogenated groundnut oil remains groundnut oil or not held that two conditions were required to be specified, namely, as to whether the oil in question was from groundnut and whether the commodity was oil or not. The court held that even when it undergoes a hardening process, the essential nature of hydrogenated groundnut oil does not change and it remains a groundnut oil. In the light of the aforesaid, the court is of the opinion that the potato does not lose its basic characteristics in the process of potato to potato chips.

26. In *Nestle India Limited Vs. State of Uttarakhand and Others*, , the controversy before the learned single judge of this court was, whether tomato ketchup was liable to be taxed at 12.5 per cent or whether it was included in entry No. 6 of Schedule II(B) of the Act. The court held that tomato sauce was covered by entry 6 of Schedule II(B) of the Act since there was no exclusion clause, namely, that the entry does not exclude tomato sauce. We are in complete agreement with the decision of the learned single judge. In the light of the aforesaid coupled with the fact that the decision of the Himachal Pradesh High Court has been stayed by the Supreme Court in Special Leave to Appeal No. 32378 of 2010 vide order dated February 18, 2011, the court is of the opinion that

potato chips, being a processed vegetable, is liable to be taxed at four per cent under entry 6 of Schedule II(B) of the Act. Consequently, the impugned order of the assessing authority, the order of the Joint Commissioner (Appeals) as well as the order of the Tribunal cannot be sustained and are quashed. The revision is allowed. The assessing authority is directed to levy tax on the revisionist with respect to the potato chips at four per cent instead of at 12.5 per cent.