

(1991) 06 GUJ CK 0001
In the Gujarat High Court
Case No : Sales Tax Reference No. 11 of 1983

State of Gujarat	Vs	APPELLANT
Chunilal Mayachand Mehta		RESPONDENT

Date of Decision : 13-06-1991

Acts Referred:

Gujarat Sales Tax Act, 1969 — Section 62, 69

Citation : (1992) 85 STC 62

Hon'ble Judges : S.D. Dave, J;A.P. Ravani, J

Bench : Division Bench

Advocate : Kamal M. Mehta, for the Appellant; N.R. Divatia, for the Respondent

Judgement

S.D. Dave, J.—The Gujarat Sales Tax Tribunal at Ahmedabad has referred the undermentioned question for our answer u/s 69 of the Gujarat Sales Tax Act, 1969.

"Whether, on the facts and in the circumstances of the case the Tribunal was correct in holding the the "Nestle Nestum" and "Nestle Nestum Baby Cereal" as sold by the opponent are covered by residuary entry 13 of Schedule III to the Gujarat Sales Tax Act, 1969 ?"

2. The abovesaid question has been referred to this Court at the instance of the Revenue in the following facts and circumstances :

The assessee, Ms. Chunilal Mayachand Mehta, had sought the determination u/s 62 of the Act in respect of the three products, namely, (i) Nestle Cerelac, (ii) Nestle Nestum Baby Cereal, and (iii) Nestle Nestum, as to what rate of tax would be payable on the sales of the abovesaid products. The Deputy Commissioner concerned had held that the product No. (i) was a vitaminised infant food sold in a sealed container, within the meaning of entry 26(2) of Schedule II, Part A, to the Act. It may be mentioned here that in this reference we are not concerned with the abovesaid article. Anyhow, the other two products were held to be food-stuff and food provisions within the meaning of entry 6 of Schedule III to the

Act. It appears that the abovesaid determination by the Deputy Commissioner came to be challenged before the Tribunal and the appeal was allowed by the Tribunal and the orders of the Deputy Commissioner came to be set aside. It was held by the Tribunal that the abovesaid two products sold by the opponent-assessee were covered by the residuary entry, that is, entry No. 13 of Schedule III to the Act. It is in these facts and circumstances that the Revenue had, acting u/s 69 of the Act, made the application for presenting a reference, which has been done.

3. As noticed above the determination orders were in respect of the abovesaid three products, but we are not concerned with the product No. (i) at present. We are, therefore, concerned with the rest of the two products in the present reference. Before proceeding further the composition of the abovesaid two products may be noticed.

4. The composition of Nestle Nestum Baby Cereal is as under :

Fat 0.5% Protein 7.5% Moisture 5.0% Carbohydrate 84.0% Mineral salts 3.0%

5. The composition of Nestle Nestum is as under :

Protein 19 g. Fat 5 g. Carbohydrate 70 g. Mineral salts 5 g. Moisture 2 g. Calories 397

6. While considering the question regarding the entry applicable to the abovesaid two preparations, the Tribunal had taken into consideration the decision rendered by this Court in *State of Gujarat v. Sarabhai Chemicals* [1971] 27 STC 170, in which a reference to the Supreme Court decision in *The State of Bombay Vs. Virkumar Gulabchand Shah*, has been made. The Supreme Court has laid down a test while deciding as to whether a particular preparation or commodity can be said to be a food or food-stuff. The Supreme Court has stated thus, while deciding the abovesaid question :

"So far as "food" is concerned, it can be used in a wide as well as a narrow sense and, in my opinion, much must depend upon the context and background. Even in a popular sense, when one asks another, "Have you had your food ?", one means the composite preparations which normally go to constitute a meal - curry and rice, sweetmeats, pudding, cooked vegetables and so forth. One does not usually think separately of the different preparations which enter into their making, of the various condiments and spices and vitamins, any more than one would think of separating in his mind the purely nutritive elements of what is eaten from their non-nutritive adjuncts."

7. Relying upon the abovesaid test by the Supreme Court, the Division Bench of this Court had come to the conclusion that ordinarily the test of an article, i.e., food, food-stuff or food substance in common parlance would be applied if the mental satisfaction which an article of food gives to a normal human being is duly compensated. This High Court has also stated that merely because a particular article provides the nourishment and sustenance would not always

carry that article within the definition of food-stuff or food provision.

8. Therefore the question with which we are concerned in the instant reference is as to whether when one demands the food this commodity could have been offered to him by way of food. We are conscious that the abovesaid two commodities are meant for the infant babies. But the same question can be put in a slightly different form. If it is put to a nursing mother as to whether she has fed her child, naturally it would not meant that the person who put the question is concerned regarding the feeding of the child with the abovesaid two products. Therefore, looking to the abovesaid test laid down by the Supreme Court and the Division Bench of this Court, it appears very clearly that, the abovesaid two articles or commodities would not fall within the definition of food-stuff so as to cover them with the entry as suggested by the Revenue.

9. It requires to be appreciated that the Division Bench of this High Court was concerned with a product known as "Limical". The abovesaid product as it appears very clearly from the judgment rendered by the Division Bench was being used for the persons who intend to reduce their weight and who were seeking a cure for the obesity. But anyhow the principle laid down in the abovesaid case remains the same and the test put forth by the abovesaid case law can be made applicable to the facts of the instant case also. Ordinarily the abovesaid commodities cannot be said to be normal food for the normal babies. In view of this position, it appears very clearly that the abovesaid two products cannot be said to be food-stuffs, which would fall within the entry No. 6 of Schedule III of the Act. In other words the abovesaid articles would fall within the residuary item at entry No. 13 of the same Schedule.

10. We have been told that looking to the present rate of the tax levied on the articles under entry No. 6 and entry No. 13, the Revenue if were to succeed in the present reference, would be the loser. Anyhow, the abovesaid is not a consideration before us while deciding the present reference. Therefore it appears that the Tribunal was justified in holding that the abovesaid two articles as sold by the assessee are covered by the residuary entry No. 13 of Schedule III to the Gujarat Sales Tax Act, 1969. The answer therefore to this reference is in the affirmative and in favour of the assessee and against the Revenue. There shall be no order as to cost in the facts and circumstances of the case.

11. Reference answered in the affirmative.