

(2015) 03 KAR CK 0097
In the Karnataka High Court
Case No : Writ Appeal No. 4627/2011 (T-RES)

State of Karnataka and Others

APPELLANT

Vs

Merino Industries Limited

RESPONDENT

Date of Decision : 20-03-2015

Acts Referred:

Karnataka Value Added Tax Act, 2003 — Section 2(34), 59(4)

Citation : (2015) 2 AKR 777 : (2015) 83 VST 409

Hon'ble Judges : S. Sujatha, J.;Vineet Saran, J.

Bench : Division Bench

Advocate : K.M. Shivayogiswamy, AGA, for the Appellant; K.P. Kumar, Sr. Counsel and Ashwini Patil, Advocate appearing for Indus Law, Advocates for the Respondent

Judgement

S. Sujatha, J.—This writ appeal is filed by the State challenging the correctness of the judgment and order passed by the learned Single Judge in Writ Petition No. 40521/2010 dated 10.02.2011.

2. The brief facts of the case are:

"- The respondent is a registered dealer under the provisions of the Karnataka Value Added Tax Act (hereinafter referred to as "the Act" for brevity). Respondent filed an application under Section 59(4) of the Act seeking clarification of the rate of tax applicable under the Act on the following commodities, the detailed description of the commodities are as follows:

(a) Vegit-Aloo Hara Bara Kebab: Ingredients are dehydrated potato flakes (53.5%), dehydrated vegetables (green peas 11%, spinach 6.5%, onion bits 4.5%, fenugreek leaves, green chilly bits), edible vegetable oil, common antioxidant and spice oleoresins. The dehydrated vegetable content in the entire pack of Vegit Aloo Hara Bara Kebab is 85%.

(b) Vegit-Aloo Veg Cutlet: Ingredients are dehydrated potato flakes, dehydrated vegetables (carrot, green peas, capsicum, french beans), refined vegetable oil,

salt, yeast extract, mixed spices, maltodextrin, hydrolysed vegetable protein, flavour enhancer and spice oleoresins. The dehydrated vegetable content in the entire pack of Vegit Aloo Veg Cutlet is 85%.

(c) Vegit-Aloo Yummy Cheese Balls: Ingredients are dehydrated potato flakes (51%), cheese powder (15%), skimmed milk powder, potato starch, maltodextrin, dehydrated onion bits, edible vegetable fats, mixed spices, common salt, flavour enhancer. The dehydrated vegetable content in the entire pack of Vegit Aloo Yummy Cheese Balls is 60%.

(d) Vegit-Aloo Mazedar Bonda: Ingredients are dehydrated potato flakes (63.4%), dehydrated onion bits (12%), edible vegetable oil, mixed spices, common salt, dehydrated green chilly powder (1.6%), maltodextrin, dehydrated ginger bits, sugar powder, raw mango powder, psyllum husk, spice oleoresins, antioxidant. The dehydrated vegetable content in the entire pack of Vegit Aloo Mazedar Bonda is 75%.

(e) Vegit-Aloo Jatpat Tikki: Ingredients are dehydrated potato flakes (73%), potato starch (10.5%), edible veg fat, cheese powder, yeast extract, salt, maltodextrin, mixed spices, flavour enhancer, spice oleoresins. The dehydrated vegetable content in the entire pack of Vegit Aloo Mazedar Bonda is 83.5%."

3. The Commissioner of Commercial Taxes by order dated 24.07.2010 clarified that the commodities in question i.e., vegit aloo hara bara kebab, vegit aloo veg cutlet, vegit aloo yummy cheese balls, vegit mazedar bonda and vegit aloo jatpat tikki are unscheduled goods liable to tax at 12.5% up to 31.3.2010 and at 13.5% from 1.4.2010. The respondent challenged the said clarification, issued by the Commissioner of Commercial Taxes in W.P. No. 40521/2010 before this Court. The learned Single Judge, by order dated 10.02.2011, allowed the writ petition filed by the respondent, setting aside the clarification issued by the Commissioner of Commercial Taxes. Against the said order passed by the learned Single Judge, wherein it is held that the commodities in question falls under Entry 3 of the III Schedule to the Act and as such exigible to levy of tax @ 4%, the State is in appeal before this Court.

4. Heard the learned counsel appearing for the parties.

5. Learned counsel Sri K.M. Shivayogiswamy appearing for the revenue argued that Entry No. 3 of the III Schedule to the Act enumerates the goods liable to tax at 4% and the said Entry covers only the processed fruits and vegetables including fruit jams, jelly, pickle, fruits squash, paste, food drink and fruit juice as described therein and the commodities in question being snack mixes do not fall under the said Entry. It was contended that the learned Single Judge, applying the law laid down by the Hon'ble High Courts of Guwahati and Madras which is not applicable to the facts of the present case, has wrongly arrived at a conclusion in classifying the commodities in question as processed vegetables falling under Entry 3 of III Schedule to the Act.

6. The learned counsel appearing for the revenue also placed reliance on the Judgment of the High Court of Himachal Pradesh in *Pepsico India Holdings Pvt. Ltd. v. Assessing Authority-I and Others* ((2010)36 VST 563 (HP)) and *M/s. Raman Boards Ltd., v. The State of Karnataka* (STRP Nos. 389-435 OF 2012 DD:20.08.2014).

7. Learned Senior Counsel Sri K P Kumar, appearing for the assessee/respondent contended that the Entry 3 of III Schedule to the Act is not a restricted entry, the word "including" enlarges the scope of the preceding words viz., "processed fruits and vegetables" indicating that the Entry is only illustrative and not exhaustive and that the "commodities" enumerated after the words "including" definitely gives the intention of the Legislature to bring similar commodities within the said Entry. Learned counsel further argued that the main composition of the commodities in question being "potato" - a vegetable, predominantly known by the common man as a vegetable, has undergone some processing and mixed with certain ingredients to make it a snack mix. As such, giving a different interpretation to the product, would defeat the intention of the Legislature. The learned Single Judge having examined these aspects has rightly held that the products in question fall under Entry 3 of third Schedule to the Act and it does not call for any interference. Reliance was placed on the following judgments:

- "1. *M/s. Saraswati Sugar Mills Vs. Haryana State Board and others*,
2. *Stovekraft Pvt. Ltd. Vs. State of Karnataka*,
3. *Shriya Enterprises Vs. Commissioner, Commercial Taxes, Uttarakhand*,
4. *Pepsico India Holdings Pvt. Ltd. Vs. State of Assam and Others*,
5. *Pepsico India Holdings Pvt. Ltd. v. Commissioner of Commercial Taxes, Chennai and Others* (2010) 29 VST 214 (Mad)
6. *Commercial Taxation Officer Vs. Rajasthan Taxchem Ltd.,* ."
8. After hearing the parties and perusing the material on record the only question that arises for our consideration is:

"Whether the commodities (a) to (e) namely, Vegit-Aloo hara bara kebab, vegit aloo veg cutlet, vegit aloo yummy cheese balls, vegit mazedar bonda and vegit aloo jatpat tikki, are covered by Entry 3 to the third Schedule of the Act attracting levy of tax @ 4% or falls under the residuary entry, liable to be taxed at a higher rate?" 9. Entry 3 of the third schedule to the Act reads thus:

"All processed fruit and vegetables including fruit jams, jelly, pickle, fruit squash, paste, fruit drink and fruit juice (whether in sealed container or otherwise)". 10. The clarification sought by the assessee is with regard to the applicability of rate of tax on the following commodities:

"(a) Vegit-Aloo Hara Bara Kebab

(b) Vegit-Aloo Veg Cutlet

(c) Vegit-Aloo Yummy Cheese Balls

(d) Vegit-Aloo Mazedar Bonda

(e) Vegit Aloo Jatpat Tikki

which are generally known as Vegit Snack Mix.

11. The process involved in the preparation of vegit snack mix is as under:

"a. The potatoes are peeled trimmed and sliced to about 5/8 inches thickness. The potatoes are then cooked at a temperature between 150 degree Fahrenheit and 165 degree Fahrenheit. This is done to ensure that the starch in the potato is gelatinized. The potatoes are then cooled to stop the cooking process. After a while they are cooked again. Certain additives are incorporated into the mash before drying to improve the texture and shelf life. The final step involved drying the potatoes in a single drum drier outfitted with four to six applicator rolls. The sheets that emerge from this process are then broken into flakes.

b. To the potato flakes, dehydrated vegetable oil, maltodextrin, spice oleoresins, skimmed milk powder, cheese powder, yeast, flavours, salt and mixed spices are added in definite proportion to get the desired Vegit snack Mix."

12. In the case of A.P. Products Vs. State of Andhra Pradesh and Others, , the Hon"ble Supreme Court has held that, "the Masala powder prepared after grinding and mixing various spices and the condiments in certain preparation is commercially a different commodity liable to be taxed." The Hon"ble Supreme Court in the said Judgment has further held as under:

"The ingredients used in preparation of masala after grinding and mixing lose their own identity and character and a new product separately known to the commercial world comes into existence. The sales tax intended to tax sales of different commercial commodities emerge into existence, they become separately taxable goods or entities for the purpose of sales tax. Therefore, "masala powder" prepared after grinding and mixing of various spices and condiments in certain proportion is commercially a different commodity liable to be taxed." 13. In the case of Annapurna Biscuit Manufacturing Co., Kanpur Vs. Commissioner of Sales Tax, U.P., Lucknow, , the Hon"ble Supreme Court, while considering the expression "cooked food" used in certain notifications issued under the U.P. Sales Tax Act, 1948 can be construed as including within its meaning biscuits also, has held that:

"It may be that biscuit is served at tea time and in its wider meaning "cooked food" may include biscuit. But ordinarily biscuit is not understood as cooked food. If a person goes to a hotel or restaurant and asks for some cooked food or "pakaya hua bhojan certainly he will not be served with biscuits in Uttar Pradesh. While it is not necessary to state in the present case as to what all items may be called as cooked food, we can definitely say that in the context and background of the notification biscuit cannot be treated as cooked food". 14. The Hon"ble

Supreme Court in the case of Annapurna Carbon Industries Co. Vs. State of Andhra Pradesh, has held as under:

"It will be noticed that the entry we have to interpret includes "parts" as well as "accessories" which are required for use in projectors or other cinematographic equipment. We think that the Andhra Pradesh High Court correctly held that the main use of the are carbons under consideration was duly proved to be that of production of powerful light used in projectors in cinemas. The fact that they can also be used for search lights, signaling, stage lighting, or powerful lighting for photography or other purposes may be required, could not detract from the classification to which the carbon arcs belong. That is determined by their ordinary or commonly known purpose or user. This, as already observed by us, is evident from the fact that they are known as "cinema are carbons" in the market." 15. The Hon"ble Supreme Court in the case of State of Uttar Pradesh and Another Vs. Kores (India) Ltd., has held as under:

"It is well settled that a word which is not defined in an enactment has to be understood in its popular and commercial sense with reference to the context in which it occurs." 16. The learned Senior counsel appearing for the assessee heavily relied upon the decision of the High Courts of Guwahati, Madras and Uttarakhand in the case of Pepsico India Holdings Private Limited (supra), wherein the question involved was, "Whether potato chips sold under the brand names "Lays" and "Uncle Chips" would be classified as "processed vegetables" or does it attract the higher rate of tax under the residuary entry of the State Sales Tax Enactments. The classification of "potato chips" is altogether different from the classification of commodities now in question before this Court."

(emphasis supplied).

17. We have read through the relevant entries of Assam VAT Act which were under consideration of the Guwahati High Court as regards "processed vegetables". Several amendments were brought in to the said entry and with effect from October 16, 2008, the entry 80 of Part A of the second schedule to the Assam VAT Act, reads as follows:

"Processed or preserved fruits and vegetables excluding 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." 18. By the said amendment, "potato chips" are excluded by explicit terms. Considering the legislative history of the said entry and the explicit exclusion of "potato chips" by the subsequent amendment, Guwahati High Court has held that "processed vegetables and fruits" is an inclusive definition, which has been followed by Madras and Uttarakhand High Courts. The entry under the Karnataka Act is no way similar to Assam VAT Act amended with effect from October 16, 2008, which was the basis for the Guwahati High Court to arrive at a conclusion that the amendment indicates the intent of the legislature i.e., prior to the amendment, what would be inferred is that "potato chips" was included in the processed

vegetables. The very same commodity "potato chips" has not been considered as a processed vegetable in the case of *Pepsico India Holdings Pvt. Ltd. (supra)* by the High Court of Himachal Pradesh. However, this issue is pending consideration before the Apex Court. Be that as it may, we are not dealing with the classification of the "potato chips" in the present case. Under the circumstances, we are of the view that the said Judgments cited at the bar on the issue of potato chips are not applicable to the facts of the present case.

19. The learned Senior Counsel appearing for the assessee has placed much emphasis on the word "including" appearing in Entry 3 of the third Schedule to the Act to put forth his contention, of inclusive definition of the expression "Processed Vegetables" being enlarged. To substantiate this contention, that the word "including" enlarges the meaning of the words "processed vegetables", reliance is placed on the Judgment of the Apex Court in the case of *Commercial Taxation Officer Vs. Rajasthan Taxchem Ltd.*, and our attention was drawn to paragraph 23 of the said Judgment which reads thus:

"We have already extracted the definition of "raw material" under section 2(34) which specifically includes fuel required for the purpose of manufacture as raw material. The word "includes" gives a wider meaning to the words or phrases in the statute. The word "includes" is usually used in the interpretation clause in order to enlarge the meaning of the words in the statute. When the word "include" is used in the words or phrases, it must be construed as comprehending not only such things as they signify according to their nature and impact but also those things which the interpretation clause declares they shall include." 20. In this case the Apex Court was considering the definition of "raw material" as it stood in the Rajasthan Sales Tax Act and the question that was considered by the Apex Court was, "Whether the diesel can be called raw material in the manufacture of polyester yarn." In that context, the Hon^{ble} Supreme Court has held that diesel being specifically and intentionally included in the definition of raw material by the Legislature, the question whether it is directly or indirectly used in the process of manufacture is irrelevant.

21. The learned Senior counsel appearing for the assessee has relied on the Judgment of this Court in the case of *Stovekraft Pvt. Ltd. Vs. State of Karnataka*, wherein this Court has held that stainless steel LPG stove, kerosene stove and vacuum flask falls under the phrase- "All utensils". This Court having observed the dictionary meaning of the word, "utensil" is a vessel, tool, implement etc.; especially for domestic or farming use; fit for use, has arrived at a conclusion that the word, "all" and "including" has special significance and classified stainless steel stove, kerosene stove and vacuum flask as utensils.

22. To distinguish between "manufacture" and "processing", the learned Senior Counsel for the assessee relied on the judgment of the Hon^{ble} Supreme Court reported in *M/s. Saraswati Sugar Mills Vs. Haryana State Board and others*, has held as under:

"15. xxxxx The essential point thus is that in manufacture something is brought into existence which is different from that originally existed in the sense that the thing produced is by itself a commercially different commodity whereas in the case of processing it is not necessary to produce a commercially different article.

16. Processing essentially effectuates a change in form, contour, physical appearance or chemical combination or otherwise by artificial or natural means and in its more complicated form involves progressive action in performing, producing or making something. (Vide *Corn Products Refining Co. v. Federal Trade Commission*, (1994) CCA 7: 144 F 2d 211)."

23. The learned counsel appearing for the revenue placed reliance on the judgment of this Court in the case of *M/s. Raman Boards Ltd., v. The State of Karnataka* (STRP Nos. 389-435/2012, D.D. 20.8.2014) wherein it is held at para 38 as under:--

"38. There are a number of factors which have to be taken into consideration for determining the classification of a product. For the purposes of classification, the relevant factors, inter alia are, statutory fiscal entry, the basic character, function and use of the goods. When a commodity falls within a tariff entry by virtue of the purpose for which it is put to, the end use to which the product is put to, cannot determine the classification of that product. It is well-established that in a taxing statute, there is no room for any intendment and regard must be had to the clear meaning of the words. The entire matter is governed wholly by the language of the enactment. If the tax-payer is within the plain terms of the exemption, he cannot be denied its benefit by calling in aid any supposed intention of the exempting authority. If such intention can be gathered from the construction of the words of the enactment or by necessary implication there from, the matter is different. The normal function of the word "including" in an entry, is to indicate that the items following the word "including" are those of the types of the main item in the entry. There could be some doubt as to whether the main entry covered them or not and therefore, the legislature specifically mentioned those items in the entry to remove scope for any doubt. In other words, the items so included with the prefix "including" would be of the type about which there could be some doubt as to whether they are covered or not by the main entry. The item about which there is no scope for doubt or there is comparatively less scope for doubt would accordingly stand automatically covered by the main items in the entry. In the absence of any inclusion or exclusion of words in the expression "paper, it must be held that it includes "all kinds of paper"."

24. The Hon"ble Supreme Court in the case of *Hindustan Aluminium Corporation Ltd. Vs. State of Uttar Pradesh and Another*, dealing with the expression, "including" has held thus:

"It is true that in the notification dated May 30, 1975, as amended retrospectively on August 14, 1975, the entry reads:

"All kinds of minerals, ores, metals and alloys including sheets and circles used in

the manufacture of brass wares and scraps containing only any of the metals, copper, tin, zinc or nickel except those included in any other notification issued under the Act."

But here, the expression "including" does not enlarge the meaning of the word "metal" and must be understood in a conjunctive sense, as a substitute for "and". This is the reasonable and proper construction having regard to the scheme followed in the framing of those notifications."

25. We have bestowed our anxious consideration to the rival contentions and the judicial pronouncements referred to above. Thus, it is clear that while construing the provisions relating to commodity classification, the understanding of the commodity in its popular and commercial sense, the predominant test, has to be applied. Applying the said test, it could be construed that the commodities in question are understood in common parlance or trade parlance, as snack mix - a different commercial commodity from that of dehydrated potato flakes. It is settled principle of law that an entry in a fiscal statute has to be read as it is. Nothing could be added to enlarge the meaning of the entry. "Processed vegetables" denotes the ordinarily understanding of the phrase by a common man. Normally, "processed vegetables" can be accepted as an alternative to "fresh vegetables". The "processed vegetables" generally available in the market are in different forms viz., canned, frozen, dried, juiced. The benefits of these processed vegetables and fruits is for convenience, longer shelf life and availability around the year. This is the general perception of the common man as regards "processed vegetables and fruits". As the name of the commodity itself suggests Cutlet, kabab, bonda, cheese balls, japat tikki are all snacks and no ordinary person treats the snack mix as "processed vegetables". The composition of any ingredient is not determinant in classifying the commodity. It is true that in all these commodities, the processed potato is mixed with other ingredients in definite proportion and the product is known in the market as "ready snack mix". Mixing of potato flakes with other ingredients in a certain proportion has to be definitely construed as a manufacturing activity, the resultant product - snack mix being a different and distinct commercial commodity. This view is supported by the dictum pronounced by the Apex Court in A.P. Products case (supra). In this background, if we examine the entry, it is certain that the phrase "including" does not enlarge the meaning of the preceding words "processed vegetables". We must derive the intent of the legislature from the context. Applying the principles of law enunciated in Hindustan Aluminium Corporation case referred to above, we are of the view that the said word "including" must be understood in a conjunctive sense as a substitute for "and". The entry is exhaustive, nothing could be added further.

26. We find that the learned Single Judge applying the principles of law laid down by the Hon'ble High Courts of Guwahati and Madras cited supra which was totally on a different commodity i.e., potato chips, has classified these commodities in question, also as falling under Entry III of Third Schedule to the

Act, which we do not agree.

27. For the aforesaid reasons, we allow this appeal setting aside the order passed by the learned Single Judge and confirming the order passed by the Commissioner of Commercial Taxes. The commodities (a) to (e) referred to above are classified as, "commodities falling under residuary entry to the Act and exigible to the appropriate rate of tax applicable thereon" and do not fall under Entry 3 of Third Schedule to the Act.

In the result, appeal stands allowed.