

(2009) 07 KL CK 0125

In the High Court Of Kerala

Case No : S.T. Rev. No's. 81 and 102 of 2009

State of Kerala

APPELLANT

Vs

Smt. K.P. Girijakumari

RESPONDENT

Date of Decision : 17-07-2009

Acts Referred:

Citation : (2010) 30 VST 599

Hon'ble Judges : C.N. Ramachandran Nair, J;C.K. Abdul Rahim, J

Bench : Division Bench

Advocate : M. Mohamed Rafiq, Government Pleader, for the Appellant; K. Mohanakannan and A.R. Pravitha, for the Respondent

Final Decision : Dismissed

Judgement

C.N. Ramachandran Nair, J.—These connected revision cases are filed by the State challenging the order of the Sales Tax Appellate Tribunal which held that white oats sold by the respondent in air tight containers attract tax under entry 173 of the First Schedule to the Kerala General Sales Tax Act, 1963 which provides tax at four per cent on flour of all cereals. The case of the Revenue is that oats is a food preparation sold in air tight containers and therefore the same was rightly assessed at 12 per cent under entry 62 of the First Schedule to the KGST Act. The assessments involved are 2003-04 and 2004-05. The first appellate authority reversed the assessment declaring the rate at four per cent under entry 173 of the First Schedule to the KGST Act which was confirmed by the Tribunal against which revisions are filed.

2. We heard learned Government Pleader appearing for the State and the Counsel appearing for the respondent. The learned Government Pleader has referred to the Tribunal's order and contended that the Tribunal's conclusion is based on the finding that the item is not sold in air tight containers. According to him, white oats are sold by the respondent in air tight containers made of polycarbonate and assumption of the Tribunal that the containers are not air tight is incorrect. Counsel for the respondent produced sample of the product

contained in polycarbonate container which is sealed air tight. It is his contention that even if item sold is in air tight containers, the same would not fall under entry 62 but will come under entry 173 as held by the Tribunal. In order to appreciate the contentions we have to refer to the relevant entries which are extracted hereunder:

Tax rate

62. Food including vegetative or animal preparations sold in air tight 12% containers and food colours, essences of all kinds and powders or tablets used for making food preparations. 173. All kinds of flour of cereals, pulses and their mixtures whether 4% packed in airtight containers or not.

3. Before proceeding to examine the appropriate classification of item we have to examine the broad classification of cereals, pulses and their products for the purpose of tax. Oats as such is not covered by any entry in any of the Schedules to the KGST Act. However oats in the form of coarse grain is exempted from tax under entry 12(3) of the First Schedule to the KVAT Act which has taken the place of Sales Tax Act from April 1, 2006. Under entry 9 of the Second Schedule to the KGST Act, all cereals including paddy, rice, jower, bajra, maize, ragi, kodon, kutki and barli were taxable only at one per cent. Similarly under entry 9A of the said Schedule wheat was also taxable at only one per cent. Even though cereals as such under entry 9 are taxable at a lower rate of one per cent, products of wheat that is maida, atta, suji were subject to tax under entry 172 at four per cent. Entry 173 provides for tax on flour of cereals, pulses and their mixtures whether packed in air tight containers or not. It is obvious from these entries that even prior to the introduction of VAT scheme the KGST Act provided for taxation of cereals pulses and their variants in product form at low rates ranging from one per cent to four per cent. In this context we have to examine whether oats which is also a cereal when sold in the form of flakes in air tight containers is taxable at four per cent provided in entry 173 or at 12 per cent under entry 62.

4. The learned Government Pleader pointed out that oats sold by the respondent is a preparation from oats grain and therefore is a food preparation falling under entry 62. We are unable to accept this contention because first part of entry 62 covers food preparation sold in air tight containers. Oats cannot be called as a food preparation. It is not a ready to eat item because it needs cooking for consumption. In other words it is not a prepared food which are ready to eat items covered by entry 62. Of course the second part of entry 62 does not refer to food preparations but the items covered are only food colours and essences used for making food preparations. White oats sold by the respondent is not a food colour or essence or powder or tablet used for making food preparation and so much so it is not covered by the latter part of entry 62 also. Therefore the contention raised by the learned Government Pleader is rejected. The next question to be considered is whether the claim of the respondent that item is covered by entry 173 is correct. In this regard we are in agreement with the

argument of the learned Counsel for the respondent and the finding of the Tribunal for the following reasons. Oats as a grain is a cereal and there is no dispute in this regard. The word flour is generally the powder form of the grain and certainly oats if sold in flour form is covered by entry 173. The question therefore is whether the oats sold in flakes or in crushed form as is done here can be treated as oats flour to bring it under entry 173. We do not think flour in the context used in entry 173 has any technical meaning to exclude crushed grain from it. On examination of the product sample we find that substantial portion of it is in powder form and remaining in the form of flakes. We are of the view that entry 173 is broad enough to cover cereals in various forms and all what is required for coverage under it is that it should be in raw condition requiring cooking for consumption. In fact all value added products of cereals sold in air tight containers except in cooked form are also covered by entry 173. We therefore hold that the item sold by respondent was rightly classified by the first appellate authority and the Tribunal as an item falling under entry 173 taxable at four per cent. Counsel appearing for both sides brought to our notice a Division Bench judgment of this Court in OTA.1/2006 wherein this Court has held that white oats sold in sealed containers attract tax at four per cent under entry 49(2) of the Third Schedule to the KVAT Act. Going by our above finding the more appropriate classification of oats in the form which it is sold probably is entry 48(5) and not under entry 49(2) of the Third Schedule to the KVAT Act. However so far as the rate of tax was rightly found to be four per cent under VAT, it is immaterial whether the classification should have been under entry 48(5) as against the consignment of the item to entry 49(2) under the judgment.

5. The revision petitions are dismissed.