(2012) 06 UK CK 0007

In the Uttarakhand High Court

Case No : Special Appeal No. 27 of 2012

State of Uttarakhand and Others — APPELLANT

Vs

Nestle India Ltd. — RESPONDENT

Date of Decision : 05-06-2012

Acts Referred:
Uttarakhand Value Added Tax Act, 2005 — Entry 6 of Schedule 2B

Citation : (2012) 55 VST 145

Hon'ble Judges : Servesh Kumar Gupta, J;Prafulla C. Pant, J

Bench : Division Bench

Advocate : K.P. Upadhayay, for the Appellant; Bharat Ji Agrawal Assisted by Shivam Agarwal and S.K. Posti, for the Respondent

Final Decision : Dismissed

Judgement

Prafulla C. Pant, J.—This appeal is directed against the order dated March 23, 2010 Nestle India Limited Vs. State of Uttarakhand and Others, , passed by the learned single judge, of this court in Writ Petition (M/S) No. 1581 of 2009, whereby the said court has allowed the writ petition and the circular dated May 30, 2009, issued by the Commissioner of Taxes, Uttarakhand, has been quashed. By the said circular letter the Departmental authorities were directed not to treat sauces like tomato sauce, etc., under entry 6 of Schedule IIB to the Uttarakhand Value Added Tax Act, 2005. Heard learned counsel for the parties.

2. The brief facts of the case are that the present respondent/assessee was served with a show-cause notice dated June 19, 2009, by the assessing authority in the light of the circular letter dated May 30, 2009, issued by the Commissioner of Taxes, Uttarakhand, as to why commercial tax at the rate of 12.5 per cent be not charged on the tomato sauce sold in the assessment year 2005-06. In response to the said notice the petitioner submitted its reply on June 29, 2009, claiming that the item was not taxable at the rate of 12.5 per cent. It was also pleaded by the assessee that tomato sauce is the item covered under entry No. 6 of Schedule IIB to the Uttarakhand Value Added Tax Act, 2005 (for short, "the

VAT Act"). The said entry covers all processed and preserved vegetables, besides vegetable mushrooms and fruits including fruit jams, jellies, fruit squash, paste, fruit drinks and fruit juices and achar (whether in sealed container or otherwise). However, the assessing authority did not accept the contention of the assessee and charged the tax under the category of unclassified items. The basis of charging the tax at the rate of 12.5 per cent was the circular letter dated May 30, 2009. It appears that the aggrieved by the said order dated July 8, 2009, passed by the assessing authority (Deputy Commissioner, Assessment Commercial Taxes, Rishikesh), the assessee filed Writ Petition No. 1581 (M/S) of 20091, challenging the circular letter dated May 30, 2009, along with the order passed by the assessing authority.

3. The learned single judge Nestle India Limited Vs. State of Uttarakhand and Others, , after hearing the parties, allowed the writ petition vide impugned order dated March 23, 2010, and quashed the circular letter. It is further directed that the value added tax at the rate of 12.5 per cent shall not be realised from the petitioner. Hence this appeal by the Revenue.

4. The only question involved in this appeal is whether the learned single judge, has rightly held that the tomato sauce is a processed vegetable.

5. Before further discussion we think, it just and proper to mention that under entry 24 of Schedule I "fresh fruits and vegetables including garlic and ginger, fresh fruit juices and fruit shakes like mango shake" are covered. Under clause (a) of sub-section (2) of section 4 of the Uttarakhand Value Added Tax Act, it is provided that no tax under the Act shall be payable on the sale or purchase of the goods specified in Schedule I. In other words, on the sale of fresh fruits and vegetables including garlic and ginger, fresh fruit juice and fruit shakes like mango shake, no tax is payable under the Act. It is not disputed that tomato is a vegetable. It is nobody''s case that tomato sauce is tomato vegetable. There is no tax on sale of fresh vegetables.

6. Under entry 6 of Schedule IIB to the Act, tax is payable on sale of all processed and preserved vegetables, vegetable mushrooms and fruits including fruit jams, jellies, fruit squash, paste, fruit drinks and fruit juices and achar (whether in sealed container or otherwise). The rate of tax for such items is four per cent.

7. The learned counsel for the State argued that tomato sauce is not mentioned in entry 6, and as such is not covered under the said entry. In this connection, it is further argued that tomato sauce is an unclassified item on which tax is payable at the rate of 12.5 per cent.

8. On the other hand, on behalf of the assessee it is contended that tomato sauce is nothing but processed tomato, as such, the impugned circular on the basis of which tomato sauce was to be treated as unclassified item was liable to be quashed as the same was against what is mentioned under entry 6 of Schedule IIB to the Uttarakhand Value Added Tax Act. It is further contended

that the learned single judge has rightly quashed the same.

9. The learned single judge has discussed at length as to why the tomato sauce is nothing but processed vegetable. It is relevant to mention here that in respect of fresh vegetables, no tax is payable at all. It is nobody''s case that sauce be treated as fresh vegetable. In the circumstances, merely for the reason, that the word "tomato sauce" is not mentioned in entry 6, it cannot be said that the same is not included, particularly when the word "All" is affixed with the expression "processed and preserved vegetables" in the entry.

10. Botanically, the tomato is a fruit but for purposes of trade it is classified as a vegetable. It is common that tomatoes are widely used as canned vegetable in the form of juice, sauces, pastes and ketchup. Tomato sauce refers to tomato concentrate with salt, pepper, onion/garlic, sugar, spices and preservatives. It is a processed item, normally marketed in bottles and Cannes, before being served as a dish.

11. In M/s. Bharat Forge and Press Industries (P) Ltd. Vs. Collector of Central Excise, Baroda, Gujarat, , the apex court has observed in para 4 as under (pages 415 in 84 STC) :

The question before us is whether the Department is right in claiming that the items in question are dutiable under tariff entry 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.

12. Also, in Mauri Yeast India Pvt. Ltd. Vs. State of U.P. and Another, , the apex court has opined that where two logical opinions are possible in respect of an item whether the same is covered under a specific entry or a residuary entry, the former is to be preferred. As such the trial court has rightly held that tomato sauce being a processed and preserved vegetable is covered under entry 6, and circular letter dated May 30, 2009, being against the spirit of entry 6 of Schedule IIB to the Value Added Tax Act, is liable to be quashed.

13. For the reasons as discussed above, in our opinion, the impugned order passed by the learned single judge, does not require any interference. Therefore, the appeal is liable to be dismissed. The same is dismissed. No order as to costs.

