
(2004) 11 AHC CK 0266

In the Allahabad High Court

Case No : Trade Tax Revision No's. 956, 960 and 961 of 1995

The Commissioner, Trade Tax

APPELLANT

Vs

S/S Suleman and Company

RESPONDENT

Date of Decision : 09-11-2004

Acts Referred:

Uttar Pradesh Trade Tax Act, 1948 — Section 11, 11(8)

Citation : (2004) 11 AHC CK 0266

Hon'ble Judges : Rajes Kumar, J

Bench : Single Bench

Advocate : S.C, for the Appellant;

Judgement

Rajes Kumar, J.—These three revisions u/s 11 of U.P. Trade Tax Act (hereinafter referred to as "Act") are directed against the orders of Tribunal dated 14.7.1995 relating to the assessment years 1986-87, 1987-88, 1988-89 respectively.

2. In all the three revisions, common questions are involved, thus they are being disposed of by a common order.

3. Question involved in all the revisions are whether the Olemessa Baby Message Oil was taxable as medicine or under the category of Cosmetics. The following question has been raised:-

"Whether the Trade Tax Tribunal was legally justified to hold that Olemessa Baby Message Oil is taxable as medicine at the rate of 5% despite the fact that the aforesaid commodity falls under the category of cosmetics and is taxable accordingly at the rate of 12%."

4. Heard Counsel for the parties.

5. Tribunal treated Olemessa Baby Message Oil as a medicine. One of the argument raised by the dealer was that Olemessa Baby Message Oil falls within the entry of "Oil of all kinds" has not been accepted by the Tribunal and no revision has been filed in this regard. Tribunal in its order referred the contents

of Booklet which refers the use of Olemessa Baby Message Oil as follows:-

"Olemessa Baby Message Oil has all the goodness and vitamins (including vitamin E) nature could give to make your baby's bones and body strong and stout. One of the safest natural vegetable Oil contains no synthetics or perfumes."

Olemessa Baby Message Oil

So much better than the synthetics oils and additives based baby message oils known for clogging the skin pores."

6. On the basis of the aforesaid reference in the Booklet, Tribunal held it as medicine.

7. Learned Standing Counsel contended that Oleinessa Baby Message Oil was of no use for curing the diseases or preventing the diseases. He submitted that according to the reference in Booklet, it is used to provide strength to the bones and not for curing the diseases or preventing the diseases, therefore, it is not a medicine. He further submitted that Olemessa Baby Message Oil provide strength to the bones and body to make it strong and stout, so that baby may look beautiful and therefore, it falls under the category of cosmetics. In support of his contention, he relied upon the decision of Apex Court in the cases reported in Sunny Industries Pvt. Ltd. Vs. Collector of Central Excise, Calcutta, 2003 Vol. I, Jt. Today page 130 Alpine Industries v. Collector of Central Excise, New Delhi 2004 UPTC 825 Shri Baidyanath Ayurvedic Bhawan Pvt. Ltd. v. Commissioner of Sales Tax, The State of Goa and Another Vs. Colfax Laboratories Ltd. and Another, Learned Counsel for the opp. party submitted that Olemessa Baby Message Oil makes the Baby's body strong and stout and therefore, it falls under the category of medicine. He further submitted that it does not provide any beautification to the body and therefore, it does not falls under the cosmetics. He relied upon the decision in the case of Balaji Agency, Gorakhpur v. Commissioner of Sales Tax reported in 1994 UPTC 184, Deys Medical Stores Ltd. v. Commissioner of Trade Tax reported in 2004 NTN 222, B.P.L. Pharmaceuticals Ltd. v. Collector of Central Excise, Vadodara 104 STC page 16.

8. Having heard submissions of the learned Counsel for the parties, I have perused the order of Tribunal and the authorities below.

9. The relevant Notification No. II-5784/X-10(D-80-U.P. Act 15/48 Order-81 dated 7.9.1981 and Notification No. ST-II-5785/X-10(1)-80 U.P. Act XV/48-Order-81 dated 7.9.1981 reads as follows:-

Schedule	-----	Sl.	No.
Description	of goods Point of Tax Rate	of	tax
-----	1	2	3
-----	1	...	4
2	...		
3	...		

4 ... 5. All kinds of cosmetics and toilet preparations for beautification or care of the face, skin, hair nails eyes or brows but not including soaps, safety razor blades, hair combs, tooth pastes, tooth powders and other dentifrices, toothbrushes and Kumkum" M or I 12%

					Schedule				
					Sl. No.	Description of			
goods	Point	of	Tax	Rate	of	tax			
					1	2	3	4	
					1 -28	29.	Medicines		
and Pharmaceutical preparation including insecticides and pesticides.									
					M Or I 6%				

10. In the case of Sunny Industries Pvt. Ltd. Vs. Collector of Central Excise, Calcutta, , Apex Court held that message oil (Ad-Vitamin Message Oil Forte containing some A & D Vitamins, even if preventing the ailment of rickets and treating the same, held not a medicament and held as a cosmetic goods. In this case, Assistant Collector classified the product under tariff item 14-F Cosmetic goods, which has been up held by the Collector (Appeals) and also by the Tribunal. Further in appeal, Hon"ble Supreme Court has also up held the order of Tribunal.

11. In the case of State of Goa and Anr. v. Colfax Laboratories Ltd. and Anr. after shave lotion held not falling within the ambit of "medicinal preparation and has been held toilet preparations. The Hon"ble Supreme Court observed as follows:-

"Therefore, in order to come within the ambit of medicinal preparations, the intended use of the article must be for treatment, mitigation or prevention of disease. The article must be used for the purpose of either curing or mitigating the disease after its symptoms have appeared or in prevention of any disease. If the intended use of the article is not for any one of the aforesaid purposes, it cannot be described as a "medicinal preparation". Therefore, the main question to be examined is whether "shaving" results in some kind of a disease which requires treatment by a medicine so that it may be cured or its effect is mitigated or at least an effort has to be made to prevent the happening of such disease by taking a preventive medicine. "Disease" means an impairment or the normal state or the living animal that interrupts or modifies the performance of the vital functions being a response to environmental factors (as malnutrition, industrial hazards, or climate) or to specific infective agents (as worms, bacteria, or viruses) or to inherent defects of the organism (as various genetic anomalies) or to combinations of these factors. The process of shaving does not cause any kind of impairment of the normal state of a person. It does not in any manner interrupt or modify the performance of any vital functions of the human body."

12. In the case of Alpine Industries v. Collector of Central Excise, New Delhi reported in Jt 2003 1 130, Hon"ble Supreme Court held as follows -

"6- Learned Counsel appearing for the appellant placed reliance on decision of

this Court in the case of B.P.L. Pharmaceuticals Ltd. v. Collector of Central Excise, Vadodara in which product with trade name Selsun used for treatment of dandruff was held classifiable as a medicament and not a cosmetic product intended for cleaning beautifying, promoting attractiveness or altering appearance. The learned Counsel highlighted nature of preparation of the product. The method in which it supplied with the label, literature, and the manner in which it is marketed to bring home his point that it is not merely a skin care lotion or cream but a "medicament" specially prepared to be supplied for use of defence personnel posted in high altitude areas or in severe weather conditions."

13. In the B.P.L. Pharmaceuticals Ltd. Vs. Collector of Central Excise, Vadodara, before the Apex Court, article for consideration was "Selsun" manufactured by the dealer under a Certificate of drug within the meaning of Drugs and Cosmetics Act, 1940. It was found that Selsun was Selenium sulfide lotion U. S. P. containing 2.5 per cent selenium sulfide w/v and was prescribed by physicians for treatment of the skin diseases, seborrhoeic dermatitis, commonly known as dandruff. Apex Court observed as follows:-

"So as medicinal properties of the product are concerned, it can be gathered from the technical and/or pharmaceutical references that selenium sulfide has ante fungal and anti seborrhoeic properties and is used in a detergent medium for the treatment of dandruff on the scalp which is a milder form of seborrhoeic dermatitis and tinea versicolour. 2.5 per cent of this compound is the therapeutic quantity."

"We can not ignore the above broad classification while considering the character of the product in question. Certainly, the product in question is not intended for cleansing, beautifying, promoting attractiveness or altering appearance. On the other hand it is intended to cure certain diseases as mentioned supra."

"The fact that the appellants have previously described the product as "Selsun shampoo" will not conclude the controversy when the true nature of the product falls for determination. In fact, notwithstanding the fact that the appellants have described the product as Selsun shampoo, the Central Board of Excise and Customs, as noticed earlier, has classified the same as patent and proprietary medicine. The respondents have accepted the same. Therefore, there is no force in the submission of the learned Counsel for the respondents that the product must be equated with shampoo."

"Another reason given by the CEGAT is that heading 33.05 uses the word "preparation for use on the" and therefore the product in question can be brought under the said heading. The Tribunal forgets that the product in question is intended as a medicine for curing the disease "tinea versicolour" and as such, applied to the skin wherever necessary apart from curing dandruff by applying on the scalp. It is also an admitted fact that even a person suffers from dandruff and that being the position the view taken by CEGAT that the product will fall under

the heading preparation for use on the hair is not sustainable. We have already noted the contents of labels and literature and a perusal of the same will show that the appellants have nowhere indicated that the product is to be used as a cosmetic or toilet preparation nor they have held out the product to be a cosmetic."

"Yet another reason given by the CEGAT for not accepting the case of the appellants was that the product is sold with a pleasant odour and, therefore, it must be treated as a cosmetic. Selenium sulphide has an unpleasant odour and to get rid of it an insignificant amount of perfume is used and make it acceptable to the consumers. A medicine, for example, sugar coated pill will nevertheless be medicine notwithstanding the sugar coating. Likewise the addition of an insignificant quantity of perfume to suppress the smell will not take away the character of the product as a drug or medicine."

14. In the case of *Balaji Agency, Gorakhpur v. Commissioner of Sales Tax* reported in 1994 UPTC 18, this Court held as follows:-

"7- The only item now left is Himtaj Oil. The Assessing Officer treated this article as a cosmetic. On appeal, the learned Assistant Commissioner (Judicial) held it to be a medicine. He has observed that it was a medicinal oil and its main function is to relieve pain. He has mentioned that this oil is used for Headache, Sambalbai, Adhkapari etc. The learned Tribunal in its order has observed that this oil was also used for applying on the head. It has held that it would be more appropriate to treat this article as a cosmetics. The Tribunal has nowhere held that this oil was essentially a hair oil. Nor it has held that it was not basically a medicinal oil meant for relieving pain as held by the learned Assistant Commissioner (Judicial). There are many oils that are medicines used for massaging painful parts of the body. Such oils would naturally fall in the category of medicines although some body may use such oil as hair oil. Such occasional or exceptional use will not change the basic character of thing. There is nothing in the order passed by the Tribunal to justify a reversion of view taken by the learned Assistant Commissioner (Judicial) who had specifically held that it was medicinal oil used for relieve from pain and for certain other diseases. On this point, therefore, the Tribunal's order suffers from an error of law and deserves to be reversed."

15. In the case of *Shri Baidyanath Ayurvedic Bhawan Pvt. Ltd. v. Commissioner of Sales Tax* reported in 2004 UPTC 825, the learned Single Judge of this Court held "*Lal Dant Manjan*" as toilet preparation and not a medicine,

16. In the case of *Deys Medical Stores Ltd. v. Commissioner of Trade Tax* reported in 2004 NTN 222, this Court held as follows"-

"20- from all the abovementioned decisions and especially the view expressed by the Apex Court in the case of *B. P. L Pharmaceuticals Ltd.* (1997) 104 STC 164, it is very clear that while a cosmetic is used on the skins of a human, being for beautification or cure and is used externally, a drug or medicine is used for the

cure or prevention of a disease, and is used both externally and internally. Baby oil and message oil are used for strengthening bones, which are not on the surface of the body but are the internal parts of the body, as such the test of a cosmetic is not applicable on them. Moreover, their formulations clearly show that they possess medicinal properties. Olive oil is not a cosmetic and is not used as a hair oil. It is costly too."

17. In the case of D.K. Sandu Bros. v. The State of M.P. reported in 4 STC 397 M. P. Board of Revenue held the preparation called "Medicated Brahmi Oil" and the further description given of it on the carton is that it is "a specific for headache, burning of the eyes, insomnia, hysterical and other mental troubles, highly efficacious in falling and gray hair" has been held as toilet article."

18. In the case of Commissioner of Sales Tax Vs. Shri Sadhna Aushadhalaya, , the Division Bench of Madhya Pradesh High Court held Mahabhringraj hair oil as toilet article and also as cosmetic. It has been observed as follows:-

"A hair oil is clearly not a pure and simple perfume and the question whether it has a sweet fragrance of a disagreeable odors is in no way determinative of its character as a Hair Oil. Livery Hair Oil, whether it is manufactured scientifically with ingredients containing some medicinal prosperities or crudely, is intended as a hair tonic for the prevention of dandruff, falling hair and baldness and for beautifying ultimately the hair and the appearance of the person using it. A hair oil may cool the brain or improve the system and induce sound sleep, but none the less it does not because of these qualities become a medicinal preparation. Now, the word "cosmetic" has been defined in Webster's International Dictionary as meaning "any external application intended to beautify and improve the complexion, skin or hair", Other dictionaries also give the same meaning. The meaning of the word "toilet", as given in Webster's International Dictionary, is "act or process of dressing, especially, formerly of dressing hair, now usually cleansing and grooming of one's person. A "toilet" preparation in any preparation which is intended to affect and conceivably to improve the bodily appearance. The words "cosmetics" and "toilet", being words of everyday use, must be construed not in any technical or scientific sense but as understood in common parlance and in commercial language. A hair oil intended to be applied to the hair and supposed to act as a hair tonic and no prevent dandruff, falling hair and baldness and to cool the brains does not cease to be a hair oil merely because it is manufactured and sold by a person dealing in medicines and according to a process more complex than used in the manufacture of ordinary hair oil. The object of all hair oils is to tidy the hair, to promote luxuriant growth of hair and to prevent dandruff and falling hair and it cannot be denied that if a hair oil produces the effects proclaimed and claimed in regard to it, then the appearance of the person using it is undoubtedly improve. We have no doubt that the hair oil manufactured by the assessee is a ""toilet article" and falls also within the meaning of the term "cosmetics"."

19. In the case of Commissioner Sales Tax Vs. Chawla Stores, , the Division

Bench of this Court has held the perfumed hair oil falls under the entry of cosmetics and toilet requisites. There the dispute was whether the perfumed hair oil was liable to tax under the entry of oil of all kinds other than edible oil or under the entry of cosmetics and toilet requisites.

20. In the case of Sialkot Trading Co. Vs. The Assistant Commissioner of Sales Tax and Another, , the Division Bench of Madhya Pradesh High Court has held that hair oil falls under the entry "Cosmetics ... but not including Kumkum and soap". In this case, there was no claim that the hair oil sold by the dealer was Medicinal preparation being medicinal oil.

21. In the case of Commissioner of Sales Tax v. Raj and Co., reported in 1985 U.P.T.C. 503 the Single Judge of this Court has held that merely because hair oil was manufactured out of several herbs having medicine properties, it cannot be said the oil was in the nature of medicine. Learned Single Judge has relied upon the judgment of Madhya Pradesh High Court in the case of Commissioner of Sales Tax Vs. Shri Sadhna Aushadhalaya, and in D.K. Sandu Bros. v. The State of M.P. reported in 4 S.T.C. 397 (supra).

22. This Court has observed that whether the oil manufactured by the assessee is or is not an item of cosmetic or toilet of, does not depend on the formula, according to which, it is manufactured. The oil manufactured by the assessee is made on several ingredients including herbs, which may be useful for removing dandruff preventing hair falling and which may be conducive to cooling the mind. The question is how the product of the assessee is understood in public, whereby the product is ultimately used? From the description given on the carton by the assessee as reproduced by Assistant Commissioner (Judicial) in his order, it is manifest that the oil manufactured by the assessee is to be applied mainly to human hair, and therefore, it is immaterial whether the assessee has named it is a hair oil or an oil simpliciter.

23. In the case of B. Shah and Co., Surat Vs. State of Gujarat, Gujarat High Court held nycil dedicated powder as a medicine. Hon"ble Gujarat High Court on a consideration of definition of word, medicines held as follows:-

"It is thus clear that the word "medicine" is susceptible of two distinct meanings and that in its ordinary sense as applied to human ailments, it means something which is administered either internally or externally in the treatment of disease or the relief of sickness. It is now well settled that the names of articles, sales as well as purchases of which are liable to be taxed, given in a statute, unless defined in the statute must be construed not in a technical sense but as understood in common parlance, vide Ramavator Budhai Prasad v. Assistant Sales Tax Officer. The word "medicine" appearing in Entry-13, Schedule-C, will therefore, have to be interpreted not in a technical sense but as understood in common parlance. In its popular sense, "medicine" is a remedial agent, a substance, which may be sold in various forms such as liquid, tablets, capsules or powder, which is administered in the treatment of disease and which has the

property of curing or remedying disease. This meaning also accords with the dictionary meaning to which we have just referred above. If this is the true meaning of "medicine" in popular parlance, many articles which may not be medicine technically or strictly so called would be covered by the wide ambit of the word "medicine" and we see no reason why Nycil powder, with its special qualities and attributes, its character and composition and its recommended or intended use as advertised by the manufacturers would not be covered within the meaning of the word "medicine" as understood in popular parlance."

24. In the case of Commissioner of Sales Tax v. S/S. Balsara Hygiene Products Ltd. reported in 1986 U. P. T. C. 367, Odomos has been held as a medicine. This Court held:-

"There cannot be dispute about the fact that Odomos is used only as mosquitoes repellent. The purpose is to save the human skin from mosquitoes which results in several infections disease; and mostly Malarial Fever etc. It is ue that it is not used as a medicine to cure some disease or to heal up some wound but it is certainly a preventive medicine which prevents the body from being infected by the bite of the mosquitoes. One redeeming feature which has also been mentioned by the Tribunal in its order is that manufacturing of this commodity is controlled by the authorities under the Drug and Cosmetics Act, 1940, which also lends supports to the contention of the respondent assessee that it is used like a medicine."

"It has been contended by the department that Odomos is available even in general stores merchandise shops and is not sold at the Chemist shop exclusively. In my opinion, the mere fact that Odomos is available even in ; general merchandise shops will not detract the substance from being used as a preventive medicine. It is well settled that common parlance meaning has to be applied while interpreting entries under the fiscal statute and the Courts have said time and against that it is not sale to be always guided by the dictionary or technical meanings. It is, therefore, not necessary to deal with various authorities cited by the learned Counsel for the assessee on the point. Since in common parlance Odomos is used as a medicine and is known as a medicine, in my opinion, the Tribunal was fully justified in holding that Odomos was covered under the notification dated 7th September, 1981."

25. From the above discussions, it is clear that the medicine is an article used for curing, mitigating or preventing the disease. Reference made in the Booklet shows that it makes Baby bone strong and stout and not used to cure any disease or prevent any disease, therefore, it can not be said to be a "medicine". In my opinion it also does not fall under the entry of "All kinds of Cosmetic and toilet preparation for beautification or care of face, skin, hair, nails, eyes or brow-----". Reference of Booklet shows that it is used to make the Baby's bone strong and stout and not to provide any beautification or to care to the skin. In the circumstances, in my view, it is liable to tax as an unclassified item.

26. In the result, revision is allowed in part. Order of Tribunal is set aside and the Tribunal is directed to pass appropriate order u/s 11(8) of the Act.