18% GST Payable On Manufacturing Of Alcohol For Human Consumption By Way Of Job Work: Andhra Pradesh High Court

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IN THE HIGH COURT OF ANDHRA PRADESH: AT AMARAVATI
C. PRAVEEN KUMAR; J., A.V. RAVINDRA BABU; J.
Writ Petition No.15534 of 2022; 20.10.2022

M/s. Esveeaar Distilleries Private Limited
versus
Assistant Commissioner (State Tax), Tirupati – II Circle, Tirupati & Four others

Counsel for the Petitioner: Sri S. Suri Babu; Counsel for the Respondents: Sri Y.N. Vivekananda, Government Pleader for respondent Nos.1, 2, 4 & 5. Sri N. Harinath, Deputy Solicitor General for respondent No.3

O R D E R

C. Praveen Kumar

The short question that arises for consideration in present writ petition is ***"whether alcoholic liquor for human consumption falls within the meaning of food or food products"?***

2. The circumstances, which led, to filing of writ petition, as under:

The petitioner herein is a manufacturer of Indian Made Foreign liquor having its distillery at Karakambadi Village, Chittoor District and is a franchisee of M/s.United Spirits Limited, Bangalore for manufacture of "McDowell" brand alcoholic beverages like rum, whisky and brandy. [It purchases extra neutral alcohol from various distilleries, food flavours, special spirits and caramel from registered dealers situated within the State of Andhra Pradesh as well as from dealers located outside the State of Andhra Pradesh]. An Assessment came to be made by the Respondent No. 1 for the Tax Period of 2017-2018, 2018-2019 & 2019-2020 in levying CGST amounting to Rs. 24,94,104/- with penalty and interest under CGST & IGST. The same is challenged on the ground that the job work charges relatable to manufacture of Alcoholic liquor in view of Notification No.6/2021-Central Tax (Rate) dated 30.09.2021 issued by the Department of Revenue, Ministry of Finance, Government of India, published in the gazette on 30.09.2021, at the rate of 18% as against 5% is illegal and contrary to law.

3. Heard Sri S. Suribabu, learned counsel for the petitioner, Sri Y. N. Vivekananda, learned Government Pleader for Commercial Tax, appearing for respondent Nos.1, 2, 4 and 5; and Sri N. Harinath, learned Deputy Solicitor General appearing for respondent No.3, and perused the record.

4. The learned counsel for the petitioner took us through the Notification, dated 28.06.2017, issued *vide* Notification No.11/2017, Notification No.31/2017, dated 13.10.2017 and Notification No.6/21, dated 30.09.2021, to show that a reading of the same would clearly establish that for the work done by the petitioner, it has to pay tax @ 5% tax and imposition of 18% by the assessing authority is bad in law.

5. He would submit that since the product manufactured by the petitioner i.e., alcohol/beverages/liquor falls under Chapter 22 of the First Schedule to the Customs Tariff Act, the respondents can only demand payment of tax at 5% and not at 18%. In other words, the argument of the learned counsel for the petitioner appears to be that since liquor also falls within the category of "Food and food products" under Chapter 22, as it was sought to

be inserted at serial No.26 after clause 'e', the rate of tax payable is only 5%.

6. Learned counsel for the petitioner further contends that having regard to Notification No.6/2021, dated 30.09.2021, which came into from 01.10.2021, the services by way of job work can only be taxed at 5% and not at 18% as no notification is published in the Gazette till 30.09.2021. In other words, Sri Suri Babu, learned counsel, would contend that the said notification, even if acceptable, can only be prospective in operation but not retrospective.

7. However, Sri Y.N. Vivekananda, learned Government Pleader for Commercial Tax appearing for the State, would submit that when the issue involves disputed questions of fact, the proper remedy for the petitioner is to file an appeal. Even otherwise, he would contend that there is no necessity for any Gazette Publication in respect of Circulars issued by G.S.T. Council from time to time. Referring to Notification Nos.11/2017 and 6/2021 coupled with Notification No.31/2017, he would contend that the argument of the learned counsel that Notification No.11/2017 is substituted by Notification No.6/2021 is not correct. On the other hand, he would contend that the issue before the Court is whether all food and food products falling under Chapter 1 of First Schedule to the Customs Tariff Act, 1975 includes alcohol. In other words, his argument appears to be that only food and food products falling under Chapter 1 to 22 in the First Schedule alone are included and the same would not cover alcohol.

8. Sri Y.N. Vivekananda, learned Government Pleader, further submits that since the notification is silent as to whether it is prospective or retrospective in operation, it is an established principle of law that the same would be retrospective in operation and that the petitioner has to pay 18% tax instead of 5%.

9. The points that arise for consideration are: -

"(i) Whether liquor is a food or food product? and

(ii) Whether imposing tax at 18% for the job work done in relation to manufacture of liquor for human consumption at 18% is prospective in operation?

10. **POINTS**:-

The assessing authority, after analyzing the subject on record, held as under:-

"…….. The objection is examined and found to be not tenable. All the products classifiable under Chapter 1 to 22 don't attracts 2.5% tax under the Act as per entry no:26(f) of notification no:11/2017-CT (Rate) dt : 28-6-2017. Only food and food products of these chapters are eligible for this exemption. Now it is to be seen whether the alcoholic liquor for human consumption can be considered as food for the purpose of levy of tax at lower rate under the said notification. There is no definition of food and food products under the Act. However, the Supreme Court in the case of Collector of Central Excise Vs Parle Exports Pvt Ltd reported in 1998 (38) ELT 741 (SC) held that non-alcoholic beverages were not eligible for exemption as food products. Everything consumed by human cannot be considered as food or food products for the purpose of exemption from GST. The context and spirt and reason of law need to be examined to extend exemption. The Hon'ble Supreme Court in the aforesaid judgment has held that "it cannot be contended that expensive items lie Gold-Spot base, Limca base or Thumsup base were intended to be given exemption at the cost of public exchequer." Similarly it would have never been the intention of law to exempt expensive items like "Alcoholic Liquor" under the category of food and food products even through the same is for human consumption. Further the notification no:6 dt: 30-9-2021 is clarificatory in nature for the above position, therefore the objection is rejected as not tenable."

11. In order to appreciate the arguments advanced, it is to be noted that on 28.06.2017, the Government of India issued Notification No.11/2017, in exercise of their powers conferred by Sub-section (1) of Section 9, Sub-section (1) of Section 11, Sub-section (5) of Section 15 and Sub-section (1) of Section 16 of the C.G.S.T. Act, 2017, pursuant to which, the Central Government, on the recommendations of the Council and on being satisfied that it is necessary in the public interest, sought to notify that the central tax, on intra-state supply of services of description, as specified in Column (3) of the Table given therein, falling under Chapter, Section or Heading of scheme of classification of services as specified in Column (2) therein, shall be levied at the rate as specified in the corresponding entry in Column (4). The word "food and food products" or "alcohol" i.e., beverages was not included under the Heading 9988 but however, tax payable for products mentioned therein was shown as "2.5" (2.5% + 2.5%). On 13.10.2017, Notification No.31/2017 came to be issued making amendments to Notification No.11/2017 whereby, in item (i), after sub-item (e), all food and food products falling under Chapters 1 to 22 in the First Schedule to the Customs Tariff Act, 1975 came to be added. But however, the tax to be paid remained unaltered at 5%. Learned counsel refers to Chapter 22 dealing with "Beverages, spirits and vinegar" to contend that as liquor forms part of Chapter 22, it was included, treating it as food. However, on 30.09.2021, Notification No.6/2021 came to be issued making further amendments to Notification No.11/2017 whereby, as against serial No.26, in Column (3), –

(A) after item (ic) and the entries relating thereto in columns (3), (4) and (5), the following entries came to be inserted:-

(3)	***(4)***	***(5)***
"(ica) Services by way of job work in relation to manufacture of alcoholic liquor for human consumption	***9***	***-"***

From the above, it is clear that the initial tax imposed @ 5% was enhanced to 18%, in respect of the nature of the work done by the petitioner.

12. It is also to be noted here that Notification No.6/2021 does not substitute earlier notification issued by the Government. It only clarifies the earlier notification by incorporating a clause, having regard to the law laid down by the Hon'ble Supreme Court.

13. It is no doubt true that only food and food products, as reflected in Chapters 1 to 22 in the First Schedule, are eligible for payment of less tax. Whether alcoholic liquor for human consumption can be considered as food for the purpose of levying tax at lower rate under the said notification?

14. It is an admitted fact that there is no definition of "food and food products" under the Act but at the same time, whatever consumed by human beings cannot be construed as "food and food products" for the purpose of exemption under G.S.T.

15. In ***Collector of Central Excise Vs Parle Exports Pvt Ltd***[1], the Hon'ble Supreme Court held that it will never be the intention of legislature to exempt expensive items like alcoholic liquor under the category of food and food products though the same is for human consumption. While dealing with the meaning of the word "food products or food beverages", the Hon'ble Supreme Court, in **Parle Exports'** case, observed that there is no direct

[1] 1998 (38) ELT 741 (SC)

evidence, as such, as to how in commercial parlance, unlike in ordinary parlance, non-alcoholic beverage bases are treated or whether they are treated as food products or food preparations. The purpose of exemption is to encourage food production and also give boost to the production of goods in common use and need. After all, the purpose of exemption is to help production of food and food preparations at cheaper price and also help production of items which are in common use and need.

16. Keeping in view the observations made in the judgments referred to above, it is to be seen whether the petitioner is entitled to any exemption and whether any exemption can be granted for the past transactions.

17. The issue as to whether alcoholic liquor is a food was dealt with by the GST Council in its 45th Meeting held on 17.09.2021. As recommended by the Council, it was clarified that food and food products in the said entry excludes alcoholic beverages for human consumption. It also states that in common parlance also, alcoholic liquor is not considered as a food. As such, services by way of job work in relation to manufacture of alcoholic liquor for human consumption are not eligible for GST @ 5% prescribed under the said entry. It would be appropriate to extract the same, which is as under:-

"H.Clarification in relation to GST rate on services

1. Coaching services to students provided by coaching institutions and NGOs under the central sector scheme of 'Scholarships for students with Disabilities" is exempt from GST.

2. Services by cloud kitchens/central kitchens are covered under 'restaurant service', and attract 5% GST [without ITC].

3. Ice cream parlor sells already manufactured ice-cream. Such supply of ice cream by parlors would attract GST at the rate of 18%.

4. Overloading charges at toll plaza are exempt from GST being akin to toll.

5. The renting of vehicle by State Transport Undertakings and Local Authorities is covered by expression 'giving on hire' for the purposes of GST exemption.

6. The services by way of grant of mineral exploration and mining rights attracted GST rate of 18% w.e.f. 01.07.2017.

7. Admission to amusement parks having rides etc. attracts GST rate of 18%. The GST rate of 28% applies only to admission to such facilities that have casinos etc.

8. Alcoholic liquor for human consumption is not food and food products for the purpose of the entry prescribing 5% GST rate on job work services in relation to food and food products."

18. On the other hand, GST Council recommended that such job work would attract GST at the rate of 18%. It is now urged that the recommendations of the GST Council are not binding and they are only directions. Even assuming it to be so, a plain reading of the item, which is in dispute, would clearly show that same cannot be treated as an article of food. It cannot be treated as an item of food for many a reasons, more particularly, for the advertisements carried on the item that consumption of the same would be injurious to health, etc. Therefore, the argument of the learned counsel for the petitioner that since alcoholic liquor found in entry 26 in terms of Notification No.11/2017, dated 28.06.2017, and thereafter, has to be treated as an article of food and as such, it is liable to be taxed at 5% (2.5% C.G.S.T. & 2.5% S.G.S.T.) cannot be accepted. Hence, the same is required to be taxed at 18%.

19. Even otherwise, Notification No.6/2021, dated 30.09.2021, published in the Gazette on

30.09.2021 itself incorporates services by way of job work in relation to manufacture of alcoholic liquor for human consumption as item No.(ica) in Column No.3 of Serial No.26 and the rate of tax is mentioned @ 9% (i.e., 9%+9%=18%). Since the manufacture by the petitioner relates to alcohol for human consumption by way of job work, the petitioner is liable to pay tax at 18%.

20. The next question that falls for consideration is:-

"Whether the petitioner is liable to pay tax at 18% with prospective or retrospective effect?"

21. In view of the finding given by us that "alcoholic liquor for human consumption" does not constitute food or food product falling within Chapters 1 to 22 of First Schedule of Customs Tariff Act, 1975, we hold that the petitioner is liable to pay tax at the rate of 18% in terms of Notification No.6/2021, dated 30.09.2021. Apart from that, it is also to be noticed that at no point of time, any exemption was specifically granted to "alcoholic liquor for human consumption". Neither the notification nor the items mentioned in Chapters 1 to 22 spell out clearly that "alcoholic liquor for human consumption" as food or food product. The petitioner, on its own, has been claiming exemption, which lead to issuance of notification No.6/2021. Though the same was published in Gazette on 30.09.2021, but this being clarificatory in nature, it has to be retrospective in operation.

22. The Hon'ble Supreme Court in ***"CIT v Vatika Township Pvt Ltd***[2], while dealing with retrospectivity of legislation, quoted G.P Singh's Principles of Statutory interpretation, which is as under:

"If a new Act is 'to explain' an earlier Act, it would be without object unless construed retrospective. An explanatory Act is generally passed to supply an obvious omission or to clear up doubts as to the meaning of the previous Act. It is well settled that if a statute is curative or merely declaratory of the previous law retrospective operation is generally intended. The language 'shall be deemed always to have meant' is declaratory, and is in plain terms retrospective. In the absence of clear words indicating that the amending Act is declaratory, it would not be so construed when the pre amended provision was clear and unambiguous. An amending Act may be purely clarificatory to clear a meaning of a provision of the principal Act which was already implicit. A clarificatory amendment of this nature will have retrospective effect and, therefore, if the principal Act was existing law which the Constitution came into force, the amending Act also will be part of the existing law."

In view of law laid down by Hon'ble Supreme Court and as the notification issued herein being of clarificatory in nature it is retrospective in operation.

23. For all the above said reasons, we see no merit in Writ Petition and same is liable to be dismissed.

24. Accordingly, this Writ Petition is ***dismissed***. There shall be no order as to costs.

Miscellaneous petitions pending, if any, in this Writ Petition, shall stand closed.

[2] MANU/SC/0810/2014