Neutral Citation No. - 2023:AHC:189780

RESERVED

Court No. - 5

Case :- SALES/TRADE TAX REVISION No. - 100 of 2023

Revisionist :- The Commissioner, Commercial Tax
Opposite Party :- M/S Adani Wilmar Ltd.
Counsel for Revisionist :- Ravi Shanker Pandey
Counsel for Opposite Party :- Sanyukta Singh

HON'BLE PIYUSH AGRAWAL,J.

1. Heard Shri Ravi Shanker Pandey, learned ACSC for the State – revisionist and Ms. Sanyukta Singh, learned counsel for the opposite party.

2. The present revisions have been filed against the judgement & order dated 17.09.2022 passed by Commercial Tax Tribunal, Ghaziabad in Second Appeal No. 588/2018 for the Assessment Year 2008-09 under the VAT Act, in which following question of law has been framed:-

> *(i) Whether on the facts and circumstances of the case, the Commercial Tax Tribunal was legally justified in treating the 'Bakery Shortening' and Vanaspati (Hydrogenated Vegetable Oil) as one and the same commodity and is taxable @ 4% under the Entry No. 130 of Schedule II, Part – A of the U.P. VAT Act, 2008?*

3. The learned ACSC for the revisionist submits that the Tribunal has wrongly dismissed the appeal of the Revenue. He further submits that the opposite party is a registered dealer and is engaged in the business of manufacture of edible oil, vanaspati ghee, including bakery shortening, coconut oil, refined oil, mustered oil, etc. and the manufacturing unit of the opposite party is at Mundra (Gujarat), Haldia (West Bengal), Andhra Pradesh, Rajasthan and Jaipur and have its branches in the State of Uttar Pradesh at various places. The main place of business in the State of U.P. is at Ghaziabad. The opposite party receives goods by way of stock transfer in the State of U.P. and made sales

thereafter. He further submits that the opposite party has admitted its tax liability @ 8% on the sale of bakery shortening treating the same as covered under Entry 130 of Part – A of Schedule – II, which specifies "Vanaspati (hydrogenated vegetable oil)". He further submits that the Assessing Authority, while framing the assessment order, rejected the said claim and levied higher rate of tax @ 12.5% treating the bakery shortening as unclassified item. Aggrieved against the said order, an appeal was preferred by the opposite party – dealer, which was allowed and confirmed by the Tribunal by the impugned order. He has relied upon the judgement of Kerala High Court in the case of ***M/s Parisons Food Private Limited Vs. Joint Commissioner of Commercial Tax & Others*** [2018 Supreme (Keral) 16] and submitted that identical issue has been dealt with in favour of the Revenue.

4. Learned ACSC further submits that the two authorities below have wrongly accepted the claim of the opposite party as the item is not covered under hydrogenated vegetable oil, but is unclassified item and attracts higher rate of tax. He prays for allowing the revision.

5. Per contra, learned counsel for the opposite party – dealer supports the order and submits that concurrent finding of fact has been recorded by the authorities below, which cannot be interfered with in the present revision. She further submits that the opposite party has brought on record various certificates of the competent authorities literature, user certificate, detail of its manufacturing product, etc., which are not in dispute at any stage and not even before this Court in the present revision. She further submits that under section 35 of the VAT Act, a decision has been given by the Commissioner in the case of ***Jain Suddh and Krishna***, where bakery shortening has been treated as vanaspati ghee and duly covered under Entry 130 of Part – A of Schedule – II. The said judgement has not been challenged or reversed by the competent

authority to the best of the knowledge of the opposite party. She further submits that the raw material used in the manufacture of vanaspati ghee (vegetable oil) and bakery shortening process is same and end users are also the same. She further submits that the materials brought on record from the stage of assessment upto the Tribunal have not been disbelieved or any contradictory material has been placed on record to justify the bakery shortening is different than vanaspati oil. She further submits that the the burden is upon the Revenue to bring material in support of the claim, if they do not agree that the item is not identical as claimed by the assessee. In support of her submissions, she has placed reliance on the judgement of the Apex Court in ***Union of India & Others Vs. Garware Nylons Limited & Others*** [(1996) 10 SCC 413] and submits that if two views are possible, one which favours the assessee should be adopted. She has further relied upon the judgement of the Apex Court in ***Mauri Yeast India Private Limited Vs. State of U.P. & Others*** [(2008) 5 SCC 680] and judgement of this Court in ***Commissioner of Sales Tax Vs. Adarsh Paper & Board Manufacturing Company*** [1987 65 STC 243 (All)]. She further submits that the judgement of Kerala High Court is not applicable in the present case as two entries are different. UP VAT Act refers spcific word "Vanaspati (hydrogenated vegetable oil)". She further relies upon two Government Orders of the Government of India dated 16.12.1998 and 30.04.2003.

6. After hearing the learned counsel for the parties, the Court has perused the records.

7. Admittedly, the issue is of a narrow compass about the tax liability of the item, i.e., as to whether bakery shortening should be covered under Entry 130, Part – A, Schedule II of UP GST Act or to be taxed as unclassified goods at a higher rate of tax, i.e., 12.5%.

8. The record reveals that the Assessing Authority has rejected the claim of 4% tax on the ground that the items are different from vegetable oil (Vanaspati Ghee) and therefore, not covered by specific entry. The record further reveals that the certificate of expert from Institute of Science & Technology for Advance Studies & Research, Gujarat has been filed clearly certifying bakery shortening as vegetable oil (vanaspati ghee). Further, a detailed description of manufacturing has been noticed by the Tribunal as to how bakery shortening and vanaspati ghee are manufactured, which are duly certified by the Institute of Science & Technology for Advance Studies & Research, Gujarat, which clearly establishes that bakery shortening and vanaspati are being manufactured from the one and the same raw material, i.e., crude vegetable oil, which pass through the same process. Further certificate was also brought on record from M/s Techno Chem International, Inc. 967 Quartzave. Boone IA 50036. USA, who is one of the largest and most accredited manufacturer of machines for Vegetable Oil & Oil Refineries since 1972. Their web site at 'Glossary of Field-Specific Terms' specifies the definition Hydrogenated Oils" as "Hydrogenates converts liquid oil into shortening (Vanaspati). It further defines shortening' as "Shortening is made by Hydrogenation of Vegetable Oils. Hydrogenation makes the oil more saturated and thus more stable. Shortening is used in cooking, frying and baking preparations". This 'Glossary of Field-Specific Terms' further defines 'Vanaspati' as "Shortening is known as "Vanaspati Ghee' in South Asian Countries mainly India, Pakistan and Bangladesh. Vanaspati Ghee is replacement for Butter Fat, which is used to be a popular cooking medium in these countries. Vanaspati Ghee is a granular texture which is obtained by cooling the Hydrogenated Oil under certain conditions".

9. As submitted by the opposite party the raw material required for the manufacturing of both the above-referred goods are exactly

same. The machineries required for producing both the above-referred goods are also same and the manufacturing process involved in producing both the goods are one and the same. The chemical properties of both the goods namely 'Bakery Shortening' and 'Vanaspati' are similar, as is evident from the comparable test reports of M/s Quality Services and Solutions (QSS), Gandhidham, Gujarat and on perusal of the same, it is clearly evident that chemical property of both the goods are one and same. Photo-state copies of the above-referred laboratory test reports had been placed on the record of Assessing Authority as well as produced before the First Appellate Authority which have been considered in the First Appeal Order.

10. It was mentioned as a matter of fact that Vanaspati is being treated as 'Partially Hydrogenated Oil as evident from the Website of Directorate of Vanaspati, Vegetable Oil & Fats, Department of Food & Public Distribution, Government of India. The term to denote the Vanaspati has been used as 'Partially Hydrogenated Edible Oil Mixture'. It was contended by the opposite party that in the grounds of State Appeal, it has admitted that the Bakery Shortening is nothing, but 'Partially Hydrogenated Vegetable Oil' having trans-fat, which is also similar to Vanaspati, while on the other hand the 'Bakery Shortening' has been treated as different from "Vanaspati by the Assessing Authority. It is important to note that there is nothing like 'Partially Hydrogenated Oil' as wrongly assumed by the Assessing Authority to distinguish bakery shortening from Vanaspati.

11. The Court attention was drawn to the word 'Bakery Shortening' which has been defined by Government of India vide clause 2 (b) of Regulating Notification No. G.S.R. 741 (E) dated 16-12-1998 as amended on 30th September 2004 issued under Essential Commodities Act 1955 as per the order called Vegetable Oil Products (Regulation Order), 1998' which says:- "*Bakery*

Shortening means Vanaspati meant for use as a shortening or Leavening Agent in the manufacturer of Bakery Products that is for promoting and the development of the desired Cellular Structure in the Bakery product with an accompanying increase its tenderness and volume".

12. In view of the above it was submitted that any goods, which is not in conformity with the "Vanaspati”, cannot be treated as 'Bakery Shortening'. In other words, it is essential that 'Bakery Shortening' should be in conformity with the 'Vanaspati". It is clearly evident that the chemical and physical properties of "Vanaspati' and 'Bakery Shortening' are one and same, hence by any stretch of imagination they cannot be treated as two different items.

13. The Court attention is further drawn towards the definition of Bakery Shortening' as per Section 2(b), the definition of 'Hydrogenation' as per Section 2(e), the definition of Vanaspati in Section 2 (m) as per the Vegetable Oil Products (Regulation) Order, 1998 issued by the Government of India under the Provisions of Essential Commodities Act 1955. It has been strongly contended that these definitions cannot be ignored to adopt the meaning of the terms defined under the Indian Law. There is no scope under Law to give any different meaning or colour to these terms as defined in the Essential Commodities Act, 1955 as the respective definitions has been dealt within the Essential Commodities Act 1955.

14. It was further mentioned by the opposite party that even for the purpose of levy of tax at the point of manufacturing or import by the Central Government, both the goods namely Bakery Shortening as well as 'Vanaspati' are covered under the same Tariff Entry Number 1516 of Central Excise Tariff Act as well as Custom Tariff Act, both of them being Indirect Taxes like Uttar Pradesh Trade Tax for Uttar Pradesh VAT in which this question of classification has been raised. Therefore, it is clearly evident

and established that under the Provisions of Central Excise Tariff Act as well as Custom Tariff Act, both the goods are being treated as one and same and therefore, treating the same as two different commodities under the Sales Tax Law of the State is not correct.

15. It was further demonstrated before the authorities below that bakery shortening is covered under the same tariff. On the test of 'Common Parlance' the Notification No. 37/2003 dated 30.4.2003 issued by the Government of India is very important and relevant as in the said Notification the Union Government has very categorically and specifically mentioned as under:- *Bakery Shortening, or partially or wholly hydrogenated vegetable fats and oils refracting thereof, commonly known as "Vanaspati" ….. The Union Government has used the word commonly known which means known and understood in the common parlance and therefore, Government of India is treating both the goods in question in common parlance as one and same commodity in the eyes of Law*.

16. Further it was submitted that in spite of the fact that addition of inert gases is permitted under the Provisions of the Prevention of Food Adulteration Rules, but the inert gases are not added by the respondent company in the products during the manufacturing process as supported by certificate submitted before the lower Appellate Authorities, by the respondent company, and therefore, the goods sold by the respondent under the name of 'Bakery Shortening' and 'Vanaspati' are absolutely one and the same. Therefore, the allegation in the Grounds of State Appeal, treating them as two different commodities on the basis of this logic is absolutely wrong on facts. In common and commercial parlance, both the goods, namely, Bakery Shortening' and 'Vanaspati' are being treated as same, since the person dealing with the goods in question are treating both the goods in question are treating both the goods similarly as well as both the goods are available on the

same shop dealing with the vegetable ghee and therefore, the allegations as made are not correct. Therefore, the goods sold by the opposite party, namely, bakery shortening and vegetable oil are absolutely one and the same and the same cannot be treated as two different items.

17. After considering various materials brought on record from the stage of Assessing Authority to the stage of Tribunal, the Assessing Authority brushed aside the evidence brought on record and levied higher rate of tax, which has been turned down by the appellate authority after due consideration of materials on record, holding that bakery shortening is one and the same thing as vanaspati. The Apex Court in ***Mauri Yeast India Private Limited*** (supra) has specifically held that if there is a conflict between the two entries, one which favours the assessee must be followed. The relevant paragraphs of the said judgement are as follows:-

> *"30. It is now a well settled principle of law that in interpreting different entries, attempts shall be made to find out as to whether the same answers the description of the contents of the basic entry and only in the event it is not possible to do so, recourse to the residuary entry should be taken by way of last resort.*
>
> *40. It is now a well settled principle of law that when two views are possible, one which favours the assessee should be adopted. [See - Bihar State Electricity Board and another vs. M/s. Usha Martin Industries and another: (1997) 5 SCC 289.*
>
> *48. We, therefore, are of the opinion that if there is a conflict between two entries one leading to an opinion that it comes within the purview of the tariff entry and another the residuary entry, the former should be preferred. "*

18. Before parting, the judgement relied upon by the Revenue of the Kerala High Court in the case of ***M/s Parisons Food Private Limited*** (supra) is distinguishable and not applicable in the present case, since the entries in both the Kerala VAT Act/UP VAT Act are different. Under the aforesaid case, entry of "others", including 'vanaspati' was interpreted by the Kerala High Court by holding that the general word "other" is followed by the specific word "including vanaspati". Hence, the definition is exhaustive, coupled with the fact that 8 digit HSN Code is provided against

the said entry under the Kerala VAT Act, while under the UP VAT Act, entry is 'Vanaspati (hydrogenated vegetable oil)', which is specific word being followed by general words. Hence, it is very wide and not exhaustive. It would, thus, cover both vanaspati and vegetable oil and also, their admixtures, since the scope of entry under the UPVAT Act is not confined to 8 digit HSN code, presented under the Kerala VAT entry.

19. Further, the notifications dated 16.12.1998 and 30.04.2003 issued by the Government of India were not placed for consideration before the Kerala High Court, wherein, it has been acknowledged by the Government of India that bakery shortening means and is commonly known as 'vanaspati'.

20. The Department has contended that item in question, i.e., bakery shortening, falls under the unclassified item, but no material has been brought on record upto the stage of Tribunal or before this Court. The Apex Court in ***Garware Nylons Limited & Others*** (supra) has held as under:-

> *"15. In our view, the conclusion reached by the High Court is fully in accord with the decisions of this Court and the same is justified in law. The burden of proof is on the taxing authorities to show that the particular case or item in question, is taxable in the manner claimed by them. Mere assertion in that regard is of no avail. It has been held by this Court that there should be material to enter appropriate finding in that regard and the material may be either oral or documentary. It is for the taxing authority to lay evidence in that behalf even before the first adjudicating authority. Especially in a case a this, where the claim of the assessee is borne out by the trade inquiries received by them and also the affidavits filed by persons dealing with the subject matter, a heavy burden lay upon the revenue to disprove the said materials by adducing proper evidence. Unfortunately, no such attempt was made. As stated, the evidence led in this case conclusively goes to show that Nylon Twine manufactured by the assessees has been treated as a kind of Nylon Tarn by the people conversant with the trade. It is commonly considered as Nylon Yarn. Hence, it is to be classified under Item 18 of the Act. The Revenue has failed to establish the contrary. We would do well to remember the guidelines laid down by this Court in Dunlop India Ltd. v. Union of India (AIR 1977 SC 597 - at page 607), in such a situation, wherein it was stated:-*

> *"......... When an article has, by all standards, a reasonable claim to be classified under an enumerated item in the Tariff Schedule, it will be against the very principle of classification to deny it the parentage and consign it to an orphanage of the residuary clause."*

21. In view of the aforesaid facts & circumstances of the case as well as the law laid down by the Apex Court as aforesaid, the revision fails and is hereby dismissed.

22. The question of law is answered accordingly.

Order Date :**-04/10/2023**
Amit Mishra