



IN THE HIGH COURT OF HIMACHAL PRADESH
AT SHIMLA

Civil Revision No.8 of 2014

Reserved on: 27.07.2023

Pronounced on:08.08.2023

M/s Gujarat Co-Operative Milk Marketing
Federation Ltd.

.....Petitioner

Versus

Additional Excise & Taxation
Commissioner and Another

.....Respondents

Coram:

Hon'ble Mr. Justice M.S. Ramachandra Rao, Chief Justice.

Hon'ble Mr. Justice Ajay Mohan Goel, Judge.

Whether approved for reporting? **Yes.**

For the petitioner : Mr. Arjun Lall, Advocate.

For the respondents : Mr. Navlesh Verma & Mr. Rakesh
Dhaulta, Additional Advocate
Generals with Mr. Gautam Sood, Mr.
Arsh Rattan & Mr. Sidharth Jalta,
Deputy Advocate Generals, alongwith
Mr. Rakesh Sharma, Standing
Counsel.

M.S. Ramachandra Rao, Chief Justice.

This Revision is preferred by the assessee under Section 48(1) of the Himachal Pradesh Value Added Tax Act, 2005 (for short the "Act") challenging the order dt. 27.11.2013 passed by the Himachal Pradesh Tax Tribunal (for short the "Tribunal") in Revision Petition

no.1/2013, where the order dt. 27.11.2012 of the Additional Excise & Taxation Commissioner-cum-Revisional Authority (South Zone), Shimla, Himachal Pradesh passed under Section 46(1) of the said Act, was upheld.

Background facts

- 2) The background facts are that the assessee is a registered dealer under the said statute and is engaged in trading of milk products, milk, edible oils etc.
- 3) One of the products, the assessee is dealing with is “*milk cream*”.
- 4) The Assessing Authority of the Excise Department had completed the assessment relating to the assessee qua VAT for the Assessment Years 2005-06 to 2008-09 on 16.02.2009 & 27.01.2010, respectively.
- 5) Thereafter, the Excise and Taxation Commissioner wrote a letter dt. 02.07.2011 to the Additional Excise and Taxation Commissioner-cum-Revisional Authority, that the assessee was liable to pay VAT on its sales of *milk cream*, but is not being assessed for the previous five years.

The suo-motu Revision proceedings initiated by respondent no.1

- 6) Thereafter, *Suo Moto* Revision was entertained by the Additional Excise and Taxation Commissioner-cum-Revisional Authority

(respondent no.1) (*Suo Moto* Revision No.03/2011-12) on 17.09.2011, after calling for the orders passed by the Assessing Authority (2nd respondent) on 16.02.2009 & 27.01.2010 and noticing that the assessee had not deposited the tax on fresh milk cream for the said period.

- 7) He thereupon issued a Notice on 17.09.2013 to the assessee to show-cause against the proposed revision of the above said orders under Section 46(1) of the Act.

Reply of assessee to the suo-motu Revision show cause notice

- 8) Reply to the said notice was submitted by the assessee contending that though it is selling fresh milk cream, it is nothing but fresh milk, wherein through a separator, the cream contents up to 25% (low fat cream) is retained, as a result of which, low fat milk cream is the outcome; and the said article is being sold under the name *fresh cream* by the assessee which is mainly used for garnishing and in preparation of tea, coffee etc.

It was also contended that the dealer had not charged any VAT on its sale; and that the milk cream is a tax free item in view of Entries 16 and 23 in Schedule-B of the Act.

The assessee also pointed out that Entry 16 mentions only “*Curd, Lassi, Butter Milk and separated Milk*”, while Entry 23

mentions “*Fresh Milk and Pasteurized Milk*” and as long as milk is available in its natural form and nothing has been done on it to make it commercially a different article, it would remain tax free under this entry.

It was contended that this product is nothing but simply milk under Entry 23 of Schedule-B of the Act, as it is only low fat cream.

It was further contended that if the activity of the assessee is interpreted to oust this product from tax free items, it would lead to the conclusion that milk being sold in the market after adding water (which makes it low fat milk) or milk being sold by others after making it rich fat milk, would also come out of the entry.

It was alleged that merely because milk obtained in natural form is subjected to certain processing resulting in the reduction either of its water or fat content, it would not cease to be milk. Moreso, when the assessee had not added anything like vitamin, flavor or essence, sugar or any other material and so the nature of fresh milk at no point of time is altered and no new product would come into being.

Stand of Department

- 9) The Department refuted the said contention and stated that milk cream is neither fresh milk, nor pasteurized milk, nor separated milk and as such, is taxable @ 12.5%/13.75%.

Order of respondent no.1

- 10) The 1st respondent then held that low fat milk cream sold by the assessee cannot anyway be covered under the entry of fresh milk, as cream is essentially a different form of milk, and low fat fresh cream is taxable @ 12.5%/13.75%. He held that low fat fresh cream is not covered by Entries 16 & 23 and is not exempt from payment of tax, and tax should have been levied on the sale of this item @ 12.5%/13.75%. He, therefore, revised the orders of the 2nd respondent-Assessing Authority, set them aside and remanded the matter to the Assessing Authority to pass a fresh order in view of his findings therein.

The order of the HP Tax Tribunal

- 11) Challenging the same, the assessee filed a Revision under Section 46(3) of the Act before the Himachal Pradesh Tax Tribunal.
- 12) Before the Tribunal, the assessee contended that the intention of Entry 23 making fresh milk and pasteurized milk, tax free, is that milk sold in

natural form should be a tax free product because nothing had been done to make the product commercially a different product.

- 13) It was contended that HSN Classification Entry no.16 for the purpose of Central Excise also contains the category of fresh milk and pasteurized milk and *includes within it 'milk cream'* as well, which is either low fat or full cream, and therefore, milk cream should be treated as milk only and should not be taxed.
- 14) Reliance was placed by the assessee on the judgment in ***Indodan Milk Products Limited versus Commissioner of Sales Tax, UP***¹ wherein, a view was taken that the expression "*milk*" not having been defined in the Act, the said word should be given a meaning which is given to it in common parlance, and has to be understood in the same sense in which it is understood by those who deal in the commodity; and in common parlance the fluid secreted by the mammary glands of a mamilla, which is used by consumers as food, is milk.
- 15) The Tribunal rejected the contentions of the assessee and held that milk cream or low fat cream is entirely different from milk in composition; and gave illustrations of milk and milk products - Cottage Cheese, Desi

¹ (1974) 33 STC 381

ghee and Khoya etc., which are obtained by subjecting natural milk to a process making them as milk products.

- 16) It also distinguished the judgment in *Indodan Milk Products Limited's case supra*, which dealt in fact with condensed milk, which was found on the facts of that case to be milk.
- 17) Reference was also made to the Punjab VAT Act and the Haryana VAT Act, by the Tribunal where tax free entries in Schedule-B are “*milk, soyabean milk except condensed milk and dried milk*” and in Haryana the tax free entry was “*fresh milk, pasteurized and separated milk*”, hinting that milk cream is not a tax free product in those States as well.
- 18) After considering the Entries 24, 28, 61 & 92 in the Himachal Pradesh Vat Act, which provided for levy @ 4% tax on Cottage Cheese, Desi Ghee, Khoya and Skimmed Milk Powder and UHT Milk, the Tribunal held that the intention of the legislature was to exempt only milk and not milk products; so *milk cream* ought not to enjoy benefit of tax exemption; and that was the same position in the other States as well.
- 19) However, partial relief was granted to the assessee by setting aside the order of the Revisional Authority dt. 27.11.2012 indicating that the Assessing Authority should levy tax @ 4% for the Assessment Years

2005-06 to 2008-09 from the assessee on the product in question and not @12.5%/13.75% as was held by respondent no.1.

The instant Revision

- 20) Challenging the same, this Revision is filed under Section 48 (1) of the Act.
- 21) The Revision was admitted on 24.11.2016.
- 22) Counsel for the assessee/petitioner firstly contended that the 1st respondent could not have exercised the *suo moto* revisional powers since he was exercising the same under a direction from the Excise and Taxation Commissioner and such exercise of power by the 1st respondent is, therefore, not *suo moto* and the said proceedings are, thus, without jurisdiction.
- 23) We do not agree with the said contention.
- 24) As per Section 46(1) of the Act, the 1st respondent may, of his own motion, call for the record of any proceedings which are pending before, or have been disposed of by, any Authority subordinate to him for the purpose of satisfying himself as to the legality or propriety of such proceedings or order made therein, and on finding the proceedings or the orders prejudicial to the interest of revenue, he may pass such order in relation thereto as he may think fit.

25) Similar provision is contained in the Punjab General Sales Tax Act, 1948.

26) A Division Bench of the Punjab and Haryana High Court in ***Hotel Oberoi Mountview versus Assessing Authority, Union Territory, Chandigarh***² held that though the Revisional Authority has to act of his own motion; he can indeed exercise such power whenever he receives any information about any illegality or impropriety committed by any of his subordinate authorities; that such information may come from any source – whether it be the department or any other person, including an assessee; and the object of giving this power of Revision to the Commissioner is for proper administration of the Act, and it is his duty to see that neither the assessee should be allowed to escape from the tax net, nor should he be required to pay tax, which he is not liable to pay under the law.

27) The Division Bench held that whenever the Commissioner receives any relevant information even though from the assessee, he can exercise his *suo moto* powers of revision if he thinks that the information is such as warranting his interference; if on receipt of information, he feels that he need not take any action in the matter, it is

²1996(102) STC 0433 (P&H)

open to him not to take cognizance of that information and leave the matter there; but where he decides to initiate action, even though he has received information from the assessee or from any other source, he will nevertheless be acting of his own motion and his action will not be allowed to be called in question merely because he received information for proceeding in the matter through an application from the assessee.

28) In fact the Supreme Court in the ***Board of Revenue, Madras versus Raj Rothers Agencies***³ also held that even an assessee can invoke the *suo moto* revisional power of the Board of Revenue under the Madras General Sales Tax Act, 1959. The Supreme Court held that such a *suo moto* revisional power is conferred on the Board to remedy any injustice and it was open to an assessee or the Revenue to bring to the notice of the Board any error made by the subordinate authorities. It held that it is upto the Board to consider whether the case is a fit case for exercising its revisional jurisdiction.

29) Having regard to the ratio laid down in the above two decisions, we hold that information to exercise *suo moto* revisional power can come

³1973 (031) STC 0434 (SC)

from any source and can even come from the assessee or from the Department itself.

- 30) The decision in *Sirpur Paper Mills Ltd. versus The Commissioner of Wealth-Tax, Hyderabad*⁴ cited by the counsel for the petitioner, did not deal with this situation and is, therefore, inapplicable.
- 31) So we find no merit in this contention and the same is rejected.
- 32) The other contention raised by the counsel for the petitioner was that there being no entry in the Act dealing with *milk cream*, the Central Excise HSN Classification Entry no.16 should be taken into account and in that entry, which relates to fresh milk and pasteurized milk, the product cream is also included and, therefore, it should be taken into account, and since *milk* is not taxable, *milk cream* also ought not to be taxed.
- 33) Counsel for the petitioner placed reliance on the judgment of the Supreme Court in *Commissioner of Central Excise, Delhi-III versus Uni Products India Ltd.*⁵ to contend that “*Harmonized Commodity Description and Coding System*”, Explanatory Notes issued by the World Customs Organization, have strong persuasive value and Courts can rely on them. He contended that there is a general trend of taking

⁴(1970) 1 SCC 795

⁵ (2020) SCC Online SC 429

assistance of these Explanatory Notes to resolve entry related disputes and the Tribunal erred in refusing to place reliance on them.

- 34) Counsel for the respondents, however, refuted the said contention and placed reliance on the judgment of the Supreme Court in ***Commissioner of Central Excise, New Delhi versus Connaught Plaza Restaurant Private Limited, New Delhi***⁶.
- 35) He contended that *milk* and *milk cream* are totally different products and nobody, who intends to buy *milk cream*, would ask for *milk*, and so the *common parlance* test needs to be applied in such situations.
- 36) In ***Connaught Plaza Restaurant Private Limited, New Delhi*** (6 Supra), after referring to several of the earlier decisions rendered by it on the said aspect, the Supreme Court observed that in the absence of a statutory definition in precise terms, words, entries and items in taxing statute, must be construed in terms of their commercial or trade understanding, or according to their popular meaning.

In other words, they have to be construed in the sense that people conversant with the subject matter of the statute, would attribute to it.

⁶ (2012) 13 SCC 639.

It stated that resort to interpretation in terms of scientific and technical meaning should be avoided in such circumstances, except where the legislature has expressed a contrary intention.

- 37) We are of the opinion that in the instant case also, a scientific or technical meaning of the term '*milk cream*', as is sought to be projected by the assessee, should not be adopted and the popular meaning of *milk cream* as is commonly understood, should be taken note of, i.e. that it is a product which is different from milk. This is because a person who wishes to buy *milk cream* would not go to the market and ask for milk. He would only ask for *milk cream* because it is a separate product though also a milk product.
- 38) In this view of the matter, we find no merit in this Revision petition, it is accordingly dismissed.
- 39) Pending miscellaneous application(s), if any, shall also stand disposed of.

(M.S. Ramachandra Rao)
Chief Justice

(Ajay Mohan Goel)
Judge

August 08, 2023
(Yashwant)