IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT :

THE HONOURABLE MR. JUSTICE C.N.RAMACHANDRAN NAIR
&
THE HONOURABLE MR. JUSTICE K.M.JOSEPH

THURSDAY, THE 31ST AUGUST 2006 / 9TH BHADRA 1928

ST.Rev..No. 7 of 2004()

TA.338/2002 of S.T.A.T.ADDL.BENCH,ERNAKULAM
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PETITIONER

SYNTHITE INDUSTRIAL CHEMICALS LTD.,
KOLENCHERRY.

BY ADV. SRI.M.PATHROSE MATHAI

RESPONDENT:

STATE OF KERALA REPRESENTED BY
SECRETARY (TAXES) COMMISSIONER COMMERCIAL TAXES,
TRIVANDRUM.

BY GOVT. PLEADER SRI. GEORGEKUTTY MATHEW.

THIS SALES TAX REVISION HAVING BEEN FINALLY HEARD ON 31/08/2006, ALONG WITH STRV.451/2005 AND CON.CASES, THE COURT ON THE SAME DAY PASSED THE FOLLOWING:

C.N.RAMACHANDRAN NAIR & K.M.JOSEPH, JJ.

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S.T.REV.CASE Nos.7/2004, 451 & 458/2005 & 216/2006

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Dated this the 31st day of August, 2006.

JUDGMENT

Ramachandran Nair, J.

The main question raised in the connected Sales Tax Revision cases arising from the orders of the Sales Tax Appellate Tribunal pertaining to sales tax assessments under the KGST Act and CST Act for the years 1997-98 and 1998-99 is whether the products manufactured and sold by the petitioner, namely, spice oil and Oleoresin fall under Entry 56 of the First Schedule to the KGST Act taxable at the rate of 12.5%. The assessments made at 12.5% by the Officer were confirmed in first appeal and also by the Tribunal. It is against this decision of the Tribunal, Revisions are filed.

2. We have heard Senior Counsel Sri. Pathros Mathai appearing for the petitioner and the Government Pleader appearing for the respondent. In order to appreciate the contentions raised with regard to rate of tax, Entry 56 of the First Schedule to the KGST Act at the relevant time is extracted hereunder for easy reference.

> "Food including vegetative or animal preparations sold in airtight containers and food colours, essences of all kinds and powders or tablets used for making food preparations."

Petitioner is mainly engaged in export of products manufactured by them and considering the export turnover, local sales turnover is insignificant. According to the petitioner, until 1997-98 assessments under the local Sales Tax Act were completed by treating the product under the residuary entry even though Entry 56 was there in the First Schedule to the KGST Act even during those years. They have relied on the decisions of the Supreme Court reported in **Commissioner of Central Excise v. Sharma Chemical works** ((2003) 132 STC 251) and contended that burden of proof that product falls within a particular tariff item is on the Revenue. There can be no controversy on this legal proposition, more so, when the rate applied prior to the relevant year was the rate applicable to items under the residuary entry, which are not specifically mentioned elsewhere in the Schedule. However, we find from the assessment order for the year 1997-98 that the Officer has discussed in detail and concluded that the product is

essence or extract of food items falling under Entry 56 of the First Schedule. The argument of the petitioner that the Officer cannot change the rate of tax applied in earlier assessments is not tenable because res judicata is not applicable to tax assessments. Rate of tax applied in earlier years can be changed for valid reasons. In fact Section 19(1) of the Act authorises an assessment to be revised if the rate of tax applied is lower than actual rate payable. In other words, correction in regard to rate of tax can not only be done in subsequent years but can be done even by revising completed assessments. Even if there is mistake in the assessments for earlier years, the same is no justification for perpetuation of mistake by it's repetition in successive assessments. Correction is always called for, but only after substantiating the mistake. The question therefore to be considered is whether the findings made by the Officer in regard to classification of the product, confirmed in two levels of appeals is correct or not. In order to find out the nature and use of the product, we requested the assessee and the department to produce the leaflets on manufacture and samples of products. Government Pleader has obtained the copy of the

leaflet available with the Assessing Officer based on which he has understood the product and made the assessments. The sample bottles of the products brought by the petitioner are not products packed by them for the market, but probably are packed for production in this court without any labels and without describing the product. Therefore we go by the product description contained in the printed leaflet of the petitioner.

3. Leaflet specifically deals with extraction of Oleoresins from Pepper, Capsicum, Chilly, Turmeric and the process involved is solvent extraction and thereafter removal of solvent. The application of the product is specifically stated therein “as use in food industry” for giving colour and flavour. The items produced are stated to be Black Pepper Oil, White Pepper Oil, Celery Seed Oil, Cinnamon Leaf Oil, Cardamom Oil, Coriander Oil, Garlic Oil, Mustard Oil, Onion Oil etc. The leaflet says even Red Sandal Wood extract and fruit and vegetable extract are used as food colours in the place of synthetic colours, which have now disappeared from the market. From the leaflet it is clear that the items manufactured and sold by the petitioner are

extracts or essences of spices, mostly in the form of oil, which are used essentially in the food industry for imparting colour and flavour to food items. Petitioner has a case that substantial sale is to drug industry, where the product has application. They have also pointed out that some items have application in cosmetics and perfumery industry. They have furnished statement containing names of purchasers, which does not show the nature of use of the items by them. Counsel stated that their buyers are engaged in manufacture of Cosmetics, Agarbathis, Pharmaceuticals etc. However, the petitioner does not deny the use of the product in food industry both for the purpose of colour and flavour. The question therefore to be considered is whether the use of the items also in drug and cosmetic industry will take it outside Entry 56. It is clear from the entry that essentially it covers only food articles and articles used to make food. In fact food colours and essences are specifically covered by Entry 56. We have already found that the products of the petitioner are essences or oil from spices mentioned above. Classification has to be done with reference to main use and purpose of an item sold. It is quite possible as in this case that the same

item may have different uses. The question therefore to be considered is what is the main or principal use of the item. The raw materials used by the petitioner, which are Pepper, Turmeric, Cardamom, Garlic etc., are food items and are generally called spices. The extracts taken by the petitioner in the form of essences and oils continue to be used in food industry as a colouring or flavouring agent. Even if the same product is sold to various industries for other use also, the same does not affect the essential nature and use of the items as food essences. It is therefore rightly classified under Essences and Food colours under Entry 56. Therefore, we confirm the order of the Tribunal and reject the Revisions on this issue.

4. Another issue raised in the Revisions is against the assessment of sale proceeds on DPEB licence. The issue is covered by the decision reported in **International Creative Foods Ltd. v. State of Kerala** (2005(1) K.L.T. 845) against the petitioner. Following the judgment of this court, we dismiss the Revisions on this issue.

5. One issue arising in the CST assessment is inclusion of sur charge along with rate of tax for assessment of turn over not covered by

C Form under Section 8(2)(b) of the CST Act. We find the Madras High Court has held that rate of tax under the law of the appropriate State will include tax payable under the relevant Sales Tax Act and Sur Charge Act. The SLP filed against the same was dismissed by the Supreme Court and the same is stated in Notes on Report in 91 STC Page 1. In the circumstances, we uphold the decision of the Tribunal treating sur charge as part of rate of sales tax for the purpose of levy of tax under Section 8(2)(b) of the CST Act.

Sales Tax Revision Cases are therefore dismissed.

(C.N.RAMACHANDRAN NAIR, JUDGE)

(K.M. JOSEPH, JUDGE)

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K.S.RADHAKRISHNAN & K.M.JOSEPH, JJ.

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W.A. No. OF 200

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JUDGMENT

Dated this the day of February, 200.