

M/S Gujarat Coop. Milk Marketing Federation Ltd. Thru G.M. Vs State Of U.P. & Others

Court: ALLAHABAD HIGH COURT

Date of Decision: May 31, 2017

Acts Referred: [Constitution of India, Article 226](#) - Power of High Courts to Issue certain writs
[Uttar Pradesh Trade Tax Act, 1948, Section 35, Section 4, Section 3A](#)

Hon'ble Judges: Pankaj Mithal, Vinod Kumar Misra

Bench: Division Bench

Advocate: Ravi Prakash Srivastava, Navin Sinha, Piyush Agarwal, Ram Prakash Srivastava

Final Decision: Allowed

Judgement

1. The petitioner is a Cooperative organisation involved in the business of "milk" and its allied products. It is engaged in manufacturing and sale of,,,

"milk" in different forms and "milk products" under the brand name of "Amul" and "Sagar" .,,,

2. The petitioner by means of this writ petition under Article 226 of the Constitution of India had initially challenged the demand notice dated,,,

08.09.2006 by which tax on sale of ""flavoured milk"" was demanded. During the pendency of the petition, assessment orders came to be passed" ,,,

for the assessment years 2006-07 and 2007-08 and the sale of ""flavoured milk"" was taxed. Therefore, the petitioner moved an application for" ,,,

amending the writ petition for adding the relief so as to quash the assessment for the aforesaid two years in respect of tax imposed on sale of,,,

flavoured milk"". The amendment application was allowed by the Court on 04.08.2016 and the petitioner was permitted not only to challenge the" ,,,

demand notice dated 08.09.2016, but also the assessment orders of years 2006-07 and 2007-08 to the extent of taxability of ""flavoured milk"" . ,,,

3. The brief background of the facts leading to the controversy involved in this writ petition are necessary to be stated before addressing the,,,

controversy on merits.,,,

4. The petitioner is selling ""flavoured milk"" in the name of ""Amul Elaichi Shake"" and ""Amul Coco Shake"" in tetra brick packaging. The said" ,,,

flavoured milk"" is a type of processed milk in which some permitted flavours, colour and sugar are added before they are packed as aforesaid for" ,,,

sale.,,,

5. A question arose whether the sale of such ""flavoured milk"" is subject to payment of tax under the U.P. Sales/Trade Tax Act, 1948 (hereinafter",,,

referred to as the Act). The petitioner in order to get the aforesaid issue resolved approached the Commissioner Trade Tax under Section 35 of",,,

the Act. The Commissioner opined that it is taxable. The opinion of the Commissioner was taken up for consideration by the Full Bench of the",,,

Trade Tax Tribunal. It vide order dated 14.03.1989 held the milk loses its characteristic as soon as any other material is added to it such as",,,

flavouring material including Elaichi etc. Accordingly, the opinion of the Commissioner was upheld. The decision of the Tribunal was challenged by",,,

the petitioner by means of Writ Petition No.1269 (Tax) of 1989 and it was dismissed on 26.10.1991 inter alia holding that "milk" or "milk",,,

products" if sold in sealed containers are not exempt from tax in view of the notification dated 31st January, 1985."",,,

6. The same controversy arose with the petitioner in respect of assessment year 1987-88. The petitioner was assessed to tax @ 12% on",,,

flavoured milk"". The appeal preferred by the petitioner was dismissed. The further appeal filed by it before the Trade Tax Tribunal was partly",,,

allowed and in view of the notification dated 07.09.1981 the rate of tax was reduced from 12% to 6% on the sale of the ""flavoured milk"". The",,,

department felt dissatisfied by the aforesaid decision. It filed a revision in the High Court. It was allowed vide judgement and order dated",,,

25.04.2005 and the sale of the ""flavoured milk"" was held to be taxable as "soft beverages" @ 12% of the turnover."",,,

7. The petitioner therefore, preferred Special Leave Petition in the Supreme Court. The leave was granted and a stay order was passed on",,,

10.02.2006 permitting the petitioner to continue depositing tax on the sale of ""flavoured milk"" @ 6% instead of 12% as an interim measure."",,,

In the meantime, a circular letter No. Legal -1(1)-M-9-(2002-2003) dated 27.11.2002 was issued by the Commissioner, Trade Tax U.P. on a",,,

certain query raised on 16.10.2002 by the Additional Commissioner, Gr.-I, Trade Tax, Ghaziabad Region, Ghaziabad. The said circular letter",,,

inter alia provides that in the light of certain decisions of the High Court and the letter of Secretary, Dairies Development Department, Government",,,

of Uttar Pradesh dated 26.02.1999 ""flavoured milk"" appears to be covered by the entry of "milk" and if some sugar or special flavours are added",,,

to it, it shall not become a commodity different from milk."",,,

8. The aforesaid circular letter was not known to the petitioner and when it came to its knowledge, it withdrew the Special Leave Petition from the",,,

Supreme Court with liberty to file a review application before the High Court. On the review application so filed, the High Court remanded the",,,

matter to the tribunal for reconsideration in the light of the circular dated 27.11.2002.,,,

9. Pursuant to the order of remand dated 22.02.2016 passed by this court, the Tribunal reconsidered the matter and vide order dated 29.12.2016",,,

held that the ""flavoured milk"" sold by the petitioner is exempt from tax. The department challenged the said order by filing a revision before the",,,

High Court and the same was dismissed on 10.04.2017 holding that as ""flavoured milk"" is covered by the entry "milk", the tribunal is perfectly",,,

justified in exempting it from tax.,,,

10. The aforesaid judgement and order of the High Court is conclusive and sets the controversy at rest as no further proceedings were initiated,,,

against the said order in any higher forum.,,,

The above being the situation in challenging the demand notice dated 08.09.2006 demanding tax on sale of ""flavoured milk"" and the subsequent",,,

orders of assessment dated 16.02.2008 and 18.02.2010 for the years 2006-07 and 2007-08, apart from technicalities the moot question which",,,

arises for consideration is whether ""flavoured milk"" in the name of ""Amul Elaichi Shake"" and ""Amul Coco Shake"" sold in tetra brick packaging by",,,

the petitioner is "milk" and is exempt from tax under Section 4 of the Act read with notification dated 31.01.1985 issued under Section 4 of the",,,

Act or is taxable?,,,

11. The question as formulated above is purely legal in nature shorn of all factual disputes. Therefore, there appears to be no difficulty for this court",,,

in exercise of its extraordinary jurisdiction to deal with it and to answer the same. It is rather more appropriate and expedient in the interest of,,,

justice to decide such a legal issue by some authoritative pronouncement instead of allowing the confusion to prevail or leaving it for decision by,,,

any subordinate authority or a tribunal.,,,

12. Thus, irrespective of the fact that the assessment orders 2006-07 and 2007-08 dated 16.02.2008 and 18.02.2010 respectively were open to",,,

appeal, we consider it expedient to decide the issue involved in exercise of our power of judicial review, more particularly when the matter had",,,

remained pending over a decade and the amendment to this effect had been permitted in the writ petition which was initially filed challenging the,,,

notice of demand alone but involving the precise issue as has been indicated above.,,,

13. We had heard Sri R.R. Agarwal, Senior Counsel, assisted by Sri Piyush Agarwal, learned counsel appearing for the petitioner and Sri C.B.",,,

Tripathi, learned Standing Counsel appearing for the respondents.",,,

14. The submission of Sri R.R. Agarwal, Senior Counsel is that the ""flavoured milk"" as sold by the petitioner is, in fact, milk and is exempt from tax",,,

under Section 4 of the Act. The notification dated 31.01.1985 supersedes all the earlier notifications. The notifications dated 07.09.1981 and,,,

12.10.1983 have no relevance and bearing on the controversy in issue. The circular dated 27.11.2002 is clear enough and it provides that the milk,,,

whether it is flavoured or otherwise will remain a milk meaning thereby that it is exempt from tax.,,,

15. On the other hand, Sri C.B. Tripathi, learned Standing Counsel submits that the circular of the Commissioner, dated 27.12.2002 is not of",,,

general direction but in the form of a letter. It has been issued without taking note of the decision of the High Court dated 26.10.1991 in the writ,,,

petition No.1269 (Tax) 1989 which was inter se the parties. The said letter therefore, would not have any legal effect in the light of the law",,,

declared by the High Court. Secondly the notifications dated 07.09.1981 and 12.02.1983 have been issued under Section 3A of the Act while,,,

notification dated 31.01.1985 has been issued under Section 4 of the Act. Therefore, in view of the decision of the Supreme Court in the case of",,,

Sales Tax Officer, Sector IX, Kanpur Vs. Dealing Dairy Products and another AIR 1994 SC 2383, the notification under Section 3-A would",,,

have the effect of withdrawing the tax exemption so as to make the product liable to tax. Lastly, any process of adding something in the milk",,,

amounts to manufacturing activity giving rise to a new product and as such ""flavoured milk"" becomes a ""milk product"" liable to tax. Additionally, ",,,

even milk sold in sealed container is not exempt from tax.,,,

16. The ancillary or the supplementary question falling for the consideration of the bench is whether the ""flavoured milk"" as sold by the petitioner is",,,

a ""soft beverage"" or a ""milk" product"" or if milk it is taxable as it is sold in sealed containers?",,,

17. Section 3 of the Act imposes liability of tax upon every dealer on his turnover of sales or purchases or both, as may be prescribed at the rates",,,

provided by or under Section 3-A of the Act. Section 3-A of the Act only provides the rates of tax on different goods and the rates as may be,,,

provided by notifications from time to time.,,,

18. Section 3-D of the Act provides for the levy of tax on the turnover of sale and purchase of certain specified goods or goods notified by the,,,

State Government.,,,

19. Section 4 of the Act provides for the exemptions from tax. It also authorises the State Government to exempt certain goods from payment of,,,

tax as may be notified. It reads as under:-,,,

Section 4. Exception from tax.,,,

No tax under this Act shall be payable on-",,,

(a) the sale or purchase of water, milk, salt, newspapers, or any other goods which the State Government may, by notification, exempt;" or",,,

(b) the sale or purchase of any goods by the All India Spinners' Association or Gandhi Ashram, Meerut and their branches; or",,,

(c) the sale or purchase of such goods by such other person or class of persons as the State Government may, by notification in the Gazette, ",,,

exempt:,,,

Provided that while granting any exemption under clause (a) or clause (b) or clause (c) the State Government may impose such conditions including,,,

the condition of payment of such fees, if any, not exceeding eight thousand rupees annually as may be specified by the State Government by",,,

notification in the Gazettee.,,,

Explanation-In this section, expression-",,,

(a) "Water" does not include mineral water, aerated water, tonic water, distilled water or scented water; ",,,

(b) "Milk" does not include condensed milk, powder or baby-milk. """,,,

(Emphasis supplied),,,

20. A plain reading of the aforesaid provision of Section 4 of the Act reveals that the State Legislature intended not to tax certain basic items of,,,

need such as water, milk, salt, newspapers or the sale and purchase of any goods by the All India Spinners Association or Gandhi Ashram, ",,,

Meerut. It exempts ""milk"" from the taxability but excludes condensed milk, powder or baby-milk from the ambit of the "milk". ",,,

21. In other words, "milk" is not taxable whereas certain forms of the "milk" such as condensed milk, milk powder or baby milk are taxable." ,,,

22. Section 4 of the Act also authorises the State Government to exempt any other goods in addition to those exempted therein from Tax under,,,

Sl.

No.",Description of goods,"Point

of tax", "Rate

of Tax

30,"Milk powder, condensed milk, baby milk, baby foods and all other food stuffs or products, whether used as such or after

mixing them with any other food stuff or beverage, when sold in sealed or tinned containers.", "M or

1",6.00%

""

Sl.

No.",Description of goods,"Point

of

tax", "Rate

of

Tax

40, "Milk (other than condensed milk, milk powder or baby milk) and milk products excluding (1) Products sold in sealed containers, (2) Sweetmeats, (3) Ghee (4) Butter, cream and cheese (5) Ice-cream and ice-candy (6) Kulfi (7) Milk shake and

(8) Lassi.",,

45. The judgement and order of the High Court dated 25.04.2005 in the previous round of litigation covering "'flavoured milk'" under the "'soft'",,

beverages"' taxable @ 12% was made ineffective vide order dated 22.02.2016 when the matter was remanded to the Tribunal. Thus, there is no",,

conclusive adjudication that "'flavoured milk'" is taxable as "'soft beverages.'" Therefore, it is not amenable to tax as soft beverages @ 12% per",,

notification dated 12.10.1983 issued under Section 3-A of the Act or @ 6% as per notification dated 07.09.1981 again issued under Section 3-A",,

of the Act",,

46. A combined reading of Section 4 of the Act with the aforesaid notifications makes it crystal clear that State Government has exempted milk",,

from payment of tax under the Act though some other forms of milk such as condensed milk, milk powder and baby milk and specified milk",,

products have not been exempted. There is no notification which provides to levy tax on "'flavoured milk'" or that it stand excluded from the",,

exemption granted vide Section 4 of the Act read with notification dated 31.01.1985 or that it stands ousted from the ambit of "milk" as contained",,

in Section 4 of the Act",,

47. A learned Single Judge of this court in Commissioner of Sales Tax Vs. M/s Neera Drinks, Muzaffarnagar 1999 U.P.T.C. 1130 while dealing",,

with the precise entry No.40 of the Notification dated 31st January, 1985 considered whether Sweeten milk, Badam Milk sold in bottles with caps",,

is exempted from payment of tax under the Act. It was held that milk put in bottles with caps do not change the entry of the product and that the",,

commodity which is sold is basically milk and therefore, exempt from tax.",,

48. Somewhat similar view was taken by his Lordship as he then was (now Judge of the Supreme Court) in Commissioner of Trade Tax Vs.",,

Nainital Dugdh Utpadan Sahkari Sangh Ltd. 2001 U.P.T.C.-328 in the said case the assessee used to sell milk after mixing some milk powder in it",,

and therefore, the question arose as to if it was a new milk product entitle to exemption under Section 4 of the Act. His Lordship held that mixing",,

of milk powder in the milk does not alter the nature of the commodity sold and it remains the same ie. milk and as such is exempted under Section,,,

4 of the Act.,,,

49. This is also the opinion expressed by the learned Single Judge of this court vide judgement and order dated 10.04.2017 while deciding the,,,

revision of the department against the order of the tribunal in the present case.,,,

50. Generally, milk is either sold raw or after some processing such as boiling or cooling to make it usable for a longer time but such processing" ,,,

even that of pasturising does not alter the nature of the milk or its characteristic. Even if milk is condensed, skimmed or toned it remains a milk" ,,,

though its form may change.,,,

51. This is what has been clarified by an expert opinion of Sri J.P. Sharma, IAS, Secretary, Dairy Development Department, Government of Uttar",,,

Pradesh, Lucknow vide his letter dated 26.02.1999 along with the Paripatra of the Government of India Ministry of Agriculture and Animal",,,

Husbandry which had defined "milk" to mean the milk of animals like, cow, buffalo, sheep or goat whether a mixture of them or processed",,,

pasteurized, sterilized, recombined, flavoured, acidified, skimmed, toned, double toned, standarized or full cream milk." ,,,

52. The aforesaid document makes no distinction between the raw or processed milk as stated above. It is on the basis of the above opinion,,,

expressed by the Secretary Milk Development Department U.P. Lucknow that a circular was issued by the Commissioner Trade Tax on,,,

27.11.2002 clarifying that mixing of sugar and flavour would also not alter the characteristic of the milk so as to make it a different product.,,,

53. Now without going into the binding nature of the aforesaid circular, as the opinion of the expert referred therein is not in dispute and there is no",,,

contrary opinion, milk sold either after boiling, cooling or mixing sugar or any flavour would not takeaway the basic characteristic of the milk so as",,,

to make it a new product and it will remain to be a milk.,,,

54. In view of above, as flavoured milk is basically a milk that stands exempted under Section 4 of the Act read with notification dated 31.01.1985",,,

whether sold in open form or in sealed containers.,,,

55. The argument that as per the ratio of Dealing Dairy Products (Supra) the exemption from tax granted vide notification issued under Section 4,,,

of the Act stands revoked once a good is made taxable under a notification issued under Section 3-A of the Act cuts no ice. It only provides for,,,

withdrawing of the exemption granted through a notification issued under Section 4 of the Act with the issuance of notification under Section 3-A,,,

of the Act but not the exemptions provided by Section 4 of the statute itself. "Milk" stands exempted under Section 4 of the Act and this,,,

exemption cannot be nullified by any notification, unless a specific notification is issued excluding "'flavoured milk'" from the cover of "milk." ,,,

To sum up:-,,,

(i) "Milk" not only raw milk, except some of its specified forms is exempt from tax under the Act by virtue of Section 4 of the Act; ,,,

(ii) "Milk" has also been exempted vide notification dated 31.01.1985 issued under Section 4 of the Act; ,,,

(iii) The aforesaid notification in addition to the "milk" exempts certain "'milk products'" as specified therein but excluding those sold in sealed" ,,,

containers; ,,,

(iv) The exclusion of the "'products sold in sealed containers'" refers to only "'milk products'" and not the "milk" more particularly when the mention" ,,,

of the "milk" in the said notification is superfluous as it stands exempted from tax under Section 4 of the Act itself; ,,,

(v) The notification dated 07.09.1981 issued under Section 3-A of the Act only prescribes the rate of tax on certain forms of "milk" and food stuffs, ,,,

or beverages sold in sealed or tinned containers. It does not postulates charging of tax either on "milk" or any other form of milk other than, ,,,

referred therein; ,,,

(vi) The notification dated 12.10.1983 issued under Section 3-A of the Act prescribing rate of tax on soft beverages is not applicable to "milk" or, ,,,

any of its form as the entry therein is of a general nature and does not override the specific entry of "milk" contained in Section 4 of the Act; and, ,,,

(vii) "'flavoured milk'" is a form of a "milk" as it is neither a derivative of the "milk" or a "'milk product"'. ,,,

56. In view of the aforesaid, the "'flavoured milk'" in controversy is a form of milk which is exempt from tax under Section 4 of the Act as no" ,,,

notification prescribes for levying tax upon it even if it is sold in sealed containers. ,,,

57. Accordingly, the demand notice as well as assessment orders dated 08.09.2006 and 2006-07 and 2007-08 demanding and assessing tax on" ,,,

the sale of "'flavoured milk'" in sealed packs are not sustainable and are quashed in so far as they hold the petitioner liable for tax on flavoured milk" ,,,

sold in sealed containers. ,,,

58. The writ petition therefore, succeeds and is allowed." ,,,