K.P. Namboodiri''s Ayurvedics Vs State of Kerala

O.T.R. No''s. 10 and 39 of 2009

Court: High Court Of Kerala

Date of Decision: Nov. 12, 2009

Acts Referred:
Kerala Value Added Tax Act, 2003 â€” Section 6(1), 8

Citation: (2010) 1 KLT 686

Hon'ble Judges: V.K.Mohanan, J; C.N. Ramachandran Nair, J

Bench: Division Bench

Advocate: Anil D. Nair, V.V. Asokan and S. Amina, for the Appellant; Mohammed Rafiq, Government Pleader, for the Respondent

Final Decision: Dismissed

Judgement

C.N. Ramachandran Nair, J.
The connected revision cases are filed, one by the manufacturer and other by the dealer raising same

question i.e., about the classification and the rate of tax on tooth powder marketed under the name ""Danthadhavanachoornam"". Overruling the

claim of the petitioners that the item is a medicament, the Kerala VAT Appellate Tribunal, Ernakulam held that the item is rightly assessed as tooth

powder (medicated or not) falling under Entry No. 92 of Notification S.R.O. No. 82/06 issued u/s 6(1)(d) of the Kerala Value Added Tax Act,

2003 (for short ''the KVAT Act''). It is against this order of the Tribunal, the petitioners have filed these revisions for a declaration by this Court

that the item is a medicament and not tooth powder as held by the Tribunal.

2. We have heard counsel appearing for both the petitioners in both the revision cases and the Government Pleader appearing for the respondent.

3. Since the name of the product is in Sanskrit, we have referred to it''s meaning in the English Learners Dictionary. It''s translation in English as

found in the dictionary on which the petitioners have no controversy is given under, means tooth, means cleaning and means powder. Therefore,

the product can be described in English language as "tooth cleaning powder". The interesting question raised by the petitioners is that the item is a

medicament prepared under the Ayurvedic system and therefore, falls under Entry 36(7)(e) of the 3rd Schedule to the KVAT Act and since it is a

medicament, the petitioners are entitled to payment of tax u/s 8(e) of the KVAT Act, which provides for payment of tax on medicine under the

Compounding Scheme at the rate of 4% on it"s Maximum Retail Price (MRP). In the assessment, the assessing officer held that item is not a

medicament, but a medicated tooth powder squarely covered by Entry 92 of Notification S.R.O. No. 82/06. Since the controversy is with regard

to the classification of item, weextract herein Entry 92 of S.R.O. No. 82/06 and Entry 36 (7)(e)(i) as follows:

Entry 92 of S.R.O. No. 82/06:

Sl. No. Description of goods HSN Code

----

1 2 3

----

92. Tooth paste, tooth powder (whether medicated or not), tooth brush and

other dentifrices, mouth washes and deodorants

(1) Toothpaste 3306.10.20

(2) Tooth powder 3306.10.10

(3) Dentifrices

(a) in powder 3306.10.10

(b) in paste 3306.10.20

(c) other 3306.10.90

(4) Yarn used to clean between the teeth (dental floss) 3306.20.00

(5) Tooth brushes, including dental plate brushes 9603.21.00

(6) Mouth washes 3306.10.90

(7) Mouth deodorants 3306.90.00

Entry 36 (7) (e) (i) Third Schedule:

Sl. No. Description of goods HSN Code

----

1 2 3

----

36. Drugs, Medicines and Bulk Drugs including

Ayurvedic, Unani, and Homoeopathic medicine

but excluding mosquito repellents and those

specifically mentioned in First Schedule and

those notified under Clause (d) of

Sub-section (1) of Section 6

(7) Medicaments (excluding good of HSN headings

Nos. 3002,3005 or 3006) consisting of two or

more constituents which have been mixed together

for therapeutic or prophylactic uses not put up

in measured doses or in forms or packings for retail

sale

(a) xxxxxx xxxxxx

(b) xxxxxx xxxxxx

(c) xxxxxx xxxxxx

(d) xxxxxx xxxxxx

(e) other

(i) Medicaments of Ayurvedic system 3003.90.11

(ii) Medicaments of Unani system 3003.00.12

(iii) Medicaments of Siddha 3003.90.13

(iv) Medicaments of 3003.90.14

Homoeopathic system

(v) Medicaments of Bio-chemic system 3003.90.15

(vi) Medicaments other than those 3003.90

given in sub-entries (i) to (v)

At our request, the petitioners have furnished the break up details of ingredients used in the manufacturing of the product. The items used are (1)

(dried ginger), (2) (dried pepper) (3) (gall-nut) (dried fruit of Ayurvedic herbal with botanical name- Terminalia Chebula) (4) (Gooseberry) (5)

(Sugar-ally, licorice) Ayurvedic herbal with botanical name Glycorrhiza Glabra(6) (sweet fennel)(Aniseed) (7) (red clay powder) (8) (Camphor).

In the product description; it is further stated that is the base and the product is flavoured with 1 % Menthol, 1 % Peppermint oil, 1 % clove oil and

1 % cinnamon oil. The contention of the petitioners is that the product with the above ingredients are manufactured under the licence issued under

the Drugs and Cosmetics Act, 1940 and therefore, should be treated as a medicament. However, in the advertisement, the manufacturers have stated that the product can be used for cleaning tooth with brush or with fingers. The claim in the advertisement is that the product will help to

prevent and cure decay of tooth, swelling of gum, shaking of the tooth, bleeding and infection in the gum, ulcers and cavity. The further claim is that

it can prevent retention of the enamel of the tooth and prevent erosion of tooth and foul smell in the mouth. With specific reference to Entry 36(7)

(e)(i) which has an HSN Code 3003.90.11, the petitioners contended that the item, being an Ayurvedic Medicament, would squarely fall under the

said entry. The petitioners have also relied on the decision of the Supreme Court reported in Puma Ayurvedic Herbal (P) Ltd. Vs. Commissioner,

Central Excise, Nagpur, and the Karnataka High Court''s decision reported in United Trading Agency v. Addl. Commissioner of Commercial

Taxes, Zone-II, Banqalore 104 STC 182 and the decision of the Madhya Pradesh High Court reported in Commissioner of Commercial Taxes,

M.P. v. Dawar Brothers 111 STC 319 and contended that going by the drug licence issued for manufacturing of product and its effectiveness to

prevent and cure various problems related to tooth and gum, the item is a ''medicament''.

4. Government Pleader, on the other hand, relied on a Division Bench decision of this Court in Heinz India Ltd. v. State of Kerala (2009) 17 KTR

323, wherein this Court held that an identical product ''Nycil Prickly Heat Powder'', though medicated, cannot be treated as medicine or drug and

on the other hand, the same would fall under specific Entry 127 to the First Schedule to Kerala General Sales Tax Act, 1963 which provides for

tax on medicated talcum powder.

5. We notice that out of the 8 or 9 ingredients used in the manufacture of product, three major items viz., dried ginger, pepper and sweet fennel are

spices which are used for cooking large number of curries. Gooseberry is an item generally used for making pickle, though it is rich in vitamin ''C''

and is also used extensively for making Ayurvedic preparations. Similarly, the other items used in the product are Ayurvedic herbs, which are used

in the preparation of several ayurvedic medicinal preparations. The petitioners do not deny the fact that the item is substantially and essentially used

as a tooth powder to clean the tooth with or without the assistance of tooth brush and is a substitute for tooth paste and is not purchased or used

as medicine by the people. An essential ingredient in any tooth paste or tooth powder is an abrasive, which in the product of the petitioners is clay

powder, which helps to clean the tooth. In fact, large number of manufacturers of tooth paste and tooth powder use antiseptic and anti

inflammatory agents also as ingredients because many people have problems in the tooth and gum, like cavity in the tooth, ulcer or swelling of the

gum. Therefore, it is not unusual that tooth paste and tooth powder manufacturers use some medical and antiseptic materials to prevent ulcer or

swelling in the mouth. However, the question to be considered is whether use of some antiseptic or anti-inflammatory agents along with other items as ingredients make the product anything other than tooth paste or tooth powder which is essentially used for cleaning the tooth and squarely

covered by Entry 92 of the notification above stated.

6. In fact, the Government is well aware of the manufacturing and marketing of medicinal tooth paste and tooth powder and that is the reason why

the tooth paste and tooth powder referred in the above entry is specifically qualified with the words ''whether medicated or not'' which means that

every form of tooth paste and tooth powder, irrespective of whether it has ingredients to prevent and cure common ailments in the tooth and

mouth, are covered by the said entry. Therefore, in our view, the assessment confirmed by the Tribunal declaring the petitioner''s product as tooth

powder, is perfectly Justified.

7. Since the petitioners have raised the specific case that the item is only a medicament prepared in the Ayurvedic system, we have to necessarily

consider whether it is medicine. On a specific question as to whether the item is used only by persons, who have problems in the mouth,

particularly in the tooth or gum, the petitioners fairly conceded that it can be used by anyone, whether there is any ailment in the mouth or not. In

other words, it is a conceded position that the essential use of item is as a tooth cleaning agent. Petitioners mainly relied on the decision of the

Supreme Court above referred wherein the Supreme Court held that the opinion of directorate of Ayurveda, has to be considered for tracing the

identity of a product. No one has certified that the petitioners'' product is a medicine or medicament. Besides the incidental benefits derived by

persons using the product for cleaning the tooth, the petitioners do not claim that anyone uses the item as a medicine for curing or preventing any

disease of the mouth. We do not think, the use of some medical agents in the manufacture of tooth powder will be a decisive test to decide

whether the product manufactured is medicine or not. In our view, the classification of the product under the statute has to be made with reference

to the main use or purpose of the product and not its incidental benefits. Since the product here is mainly used as a tooth cleaning agent, it is

squarely covered by Entry 92 of the Notification, which takes in medicated tooth powder also. The contention that the product is a medicament, is

clearly unacceptable, because it is one not used for treatment or for prevention of any disease. Medicament is generally an item of medicine either

for consumption or for external use. Petitioner''s product is neither consumed nor used externally, but is used for a short time to clean tooth. There

is no need for us to consider whether the ingredients in the product can cure or prevent any problem in the mouth within a short time of cleaning the

tooth with the product. Assuming, the product can achieve such a result still, we feel, it does not cease to be tooth powder because it is used

substantially and essentially for cleaning the tooth. We are of the view that the Division Bench judgment, in the case of Prickley Heat Powder, though rendered in the context of the Sales Tax Act, for the purpose of classification squarely applies here because there also the product was

medicated though used as a powder for external use. However, the Division Bench held that it more appropriately falls within the Entry for talcum

powder including medicated talcum powder and the petitioner''s claim that it was a medicine was turned down.

We therefore hold that Danthadha vanachooram is a medicated tooth powder falling under Entry 92 of the S.R.O. above stated and the

petitioner''s claim that it is a medicament is absolutely incorrect. We therefore dismiss the Revision Petitions.