

(2008) 06 KL CK 0062

High Court Of Kerala

Case No: O.T. Appeal No. 1 of 2006 and WP (C) No"s. 36213 of 2007 and 415 of 2008

Thomson Paper Products

APPELLANT

Vs

Commissioner, Commercial
Taxes and Another

RESPONDENT

Date of Decision: June 11, 2008

Acts Referred:

- Kerala Value Added Tax Act, 2003 - Section 94

Citation: (2009) 19 VST 359

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

Bench: Division Bench

Advocate: K.I. Mayankutty Mather and Joy Thattil Ittoop, for the Appellant; Government Pleader, for the Respondent

Final Decision: Dismissed

Judgement

C.N. Ramachandran Nair, J.

The only issue arising in all the three cases filed by the same assessee pertains to the tax liability on the assessee's product, "white oats", under the Kerala Value Added Tax Act, 2003. On application filed u/s 94 of the Act, the Commissioner of Commercial Taxes, vide annexure A order produced in O.T.A. No. 1/2006, clarified that "white oats" falls under the residual entry taxable at 12.5 per cent. While the petitioner is challenging the clarification in the O. T. A, in the connected two cases, challenge is against assessments at the higher rate of tax at 12.5 per cent.

2. We have heard learned Counsel appearing for the assessee and learned Government Pleader appearing for the respondent.

3. The first question to be considered is whether "white oats" sold by the assessee under the name "Shantis" is exempted from tax under original entry 9 renumbered as 12 of the First Schedule to the Act and if not, the appropriate rate applicable to the product under the other Schedules to the Act. Learned Counsel appearing for

the assessee has referred to the word used "oats" in entry 12(3) of the First Schedule [previously item 9(3) of the same Schedule] and contended that "oats" in all forms are exempted from tax. In order to appreciate the contention, we have to refer to the relevant entry, which is extracted hereunder.

12. Coarse grains other than rice and wheat

(1) Rye

(2) Barley

(3) Oats

(4) Maize (Corn)

(5) Grain Sorghum

(6) Buckwheat

(7) Millet including jawar, bajra, ragi.

(8) Canary seed

(9) Paddy and paddy chaff

(10) Other cereals

4. The question to be considered is whether "white oats" marketed by the assessee under the name "Shantis" can be treated as "oats" as referred in the above entry. We have seen the product produced in the court, which is prepared oats flakes sold in a sealed container made of plastic or poly carbonate. It is noticed from the product description that no additives are used by the assessee in the preparation and the product is 100 per cent oats. It is stated in the attached label that the item can be consumed after cooking in milk or water for five minutes. It is obvious from the nature of the product and the product description that it is not "oats" grain pure and simple, but is a preparation made of it. It may probably be comparable to rice flakes made from rice or corn flakes made from corn. Entry heading of item 12 of the First Schedule makes it clear that the items intended to be covered under the group heading are "coarse grains". The assessee's product is not "coarse grain" but a refined product made out of coarse grain "oats". Moreover, items 1 to 9 arrayed under entry 12 of the First Schedule are not any product of the grain named therein, but are grains of various types in the pure and simple form. We, therefore, reject assessee's claim that the product is exempted from tax under item 12(3) of the First Schedule to the Act.

5. The next question to be considered is whether the item falls under any entry of any of the other Schedules to the Act to justify the clarification and assessment under the residual entry at 12.5 per cent. Learned Counsel for the assessee has referred to items contained in entries 48 and 49 of the Third Schedule to the Act,

which provide for levy of tax on various forms of grains and food products.

6. For easy reference, we extract hereunder entries 48 and 49 of the Third Schedule to the Act.

48. Hour, atta, maida, suji, besan and dough

(1) Wheat or meslin flour

(2) Rye flour

(3) Maize (corn) flour

(4) Rice flour (puttu podi and the like)

(5) Other cereal flour

(6) Hour, meal and powder of the dried leguminous vegetables

(7) Wet mix.

49. Food products like pickles, corn flakes, savouries, sweets made of groundnuts, gingelly, other than those sold under brand name registered under the Trade Marks Act, 1999.

(1) Pickles

(2) Savories like chips, popcorn, murukku, achappam, pakoda, mixture, chikky items, kuzhalappam and similar preparations.

(3) Corn flakes

(4) Sweets made of groundnuts or gingily.

7. Obviously "oats" is not an item covered by entry 48. However, it is a food product like corn flakes, which is covered by entry 49. Even though learned Government Pleader pointed out that only four items are covered by entry 49, which does not prescribe "oats" specifically, we find item (2) of entry 49 refers to similar preparations. Since entry 49 provides for food products, we are of the view that food products other than those mentioned elsewhere will come under "similar preparations" referred to in entry 49(2) of the Third Schedule.

8. We, therefore, hold that "white oats" other than those sold under brand name registered under the Trade Marks Act 1999, will be taxable at four per cent under entry 49(2) of the Third Schedule to the KVAT Act. It is for the assessing officer to examine whether the appellant has obtained a trade mark registration for the product and if not to assess the product at four per cent. In view of the above findings, we allow O. T. A. No. 1/2006 in part by holding that "white oats" is taxable under entry 49(2) of the Third Schedule at four per cent, if the assessee does not have a registered brand name under the Trade Marks Act, 1999. In view of the above, we direct the assessing officer to revise the assessments made up to date at

four per cent but forfeit excess collection of tax after date of clarification.

9. The O. T. A and the writ petitions are allowed to the extent indicated above.