

Glaxo Smithkline Consumer Healthcare Limited Vs State of Tamil Nadu

Court: Madras High Court

Date of Decision: Aug. 24, 2012

Acts Referred: Tamil Nadu General Sales Tax Act, 1959 "Section 12(3)(b), 16(2), 23, 23(2), 3

Citation: (2013) 62 VST 294

Hon'ble Judges: K. Ravichandrababu, J; Chitra Venkataraman, J

Bench: Division Bench

Advocate: N. Prasad, for the Appellant; R. Sivaraman, Special Government Pleader (Taxes), for the Respondent

Final Decision: Allowed

Judgement

@JUDGMENTTAG-ORDER

Chitra Venkataraman, J.

The assessee has filed T.C. (R). Nos. 1665, 1632 and 1619 of 2008 as against the order of the Tribunal relating

to assessment years 1990-91 to 1992-93, wherein the Tamil Nadu Sales Tax Appellate Tribunal confirmed the levy of penalty u/s 23 of the Tamil

Nadu General Sales Tax Act 1959 (hereinafter referred to as "the Act"). W.P. Nos. 33772 to 33777 of 2007 relate to assessment years 1993-94

to 1997-98 and 1999-2000. The writ petitions are also on the very same issue regarding the levy of penalty. The issue taken in these writ petitions

are as regards collection of differential levy under the proviso to section 3(3) of the Tamil Nadu General Sales Tax Act. The assessments

concerned in the writ petitions are all revision of assessment. As far as the assessment order relating to the assessment year 1998-99 is concerned,

since the reassessment proceedings are time-barred, no question arises before this court for any consideration.

2. The above tax case revision and writ petitions arise out of two independent common orders passed by the Tamil Nadu Sales Tax Appellate

Tribunal covering the period from 1990-91 to 1992-93 and 1993-94 to 1997-98 and 1999-2000.

3. The petitioner/assessee is a public limited company. It has two factories, one at Rajahmundry in the State of Andhra Pradesh and other at

Chengleput District at Chettipunyam. The factory at Chettipunyam is engaged in the manufacture of malted milk food for Horlicks. From

Rajahmundry, at an intermediate stage, the product is transferred to the factory at Chettipunyam, Chengalpattu District, in the State of Tamil Nadu,

wherein the assessee is stated to be carrying on activities, viz., keeping the manufacturing product in bulk drums to ensure that flavour is

developed, to ensure that proper aroma is achieved, sample is drawn from drums and sensory evaluation is conducted for the achievement of

uniform bulk density. For this, the product of different bulk density are mixed together through a vibrator to ensure that the product achieve uniform

bulk density. It is stated that the process is carried on to have uniform measurement and that ullage in the bottles is uniform. Thus, the process

carried ensures uniform size of the particle which is kept within the acceptable standards and this activity is performed by transferring the products

through a vibratory sieve which breaks soft lump into powdery form. It is further explained that for removal of iron contamination, the product

passes through magnetic plates. Ultimately, the product is packed to the measures as per the requirement of Weights and Measurement Act. The

product being hygroscopic in nature, it has to be protected to maintain its flavour and taste. The process requires careful packing which includes

labelling the name to the product, manufacturing details as to the month and batch number, packing date, expiry date, best before details, maximum

retail price and the list of ingredients. Before releasing the product for marketability, the bottles are examined for any defect and put through the

conveyor belt to blow air into the bottles to remove any contamination in the form of dust. The processed bottles then pass through an ultra violet

tunnel, by which microbial contamination is removed. Ultimately, the bottles are sealed and brought into the market. It is stated that for bringing

Horlicks as a marketable commodity in the sealed container, the petitioner purchased caps and labels using form XVII and thereby availed the

benefit of concessional rate of three per cent u/s 3(3) of the Act.

4. The assessee took the contention that the manufacturing activity comes to a full form only when the goods in question are packed and ready for

sale. In the circumstances, purchase of bottle caps were entitled to the concessional levy. Referring to the provisions u/s 3(3) of the Tamil Nadu

General Sales Tax Act, 1959 the petitioner submitted that, on facts, there was no violation of the declaration warranting levy of penalty u/s 23 of

the Act. The officer, however, rejected the said contention holding that plastic caps were not component part of Horlicks, hence, penalty u/s 23 of

the Act stood attracted. The officer viewed that all that the assessee did was only the marketing of the manufactured product. Under the Tamil

Nadu General Sales Tax Act, both are distinct activities. Consequently, he held that the transactions relating to purchase of caps would not be

covered u/s 3(3) of the Act. Aggrieved by this, the assessee went on appeal before the Appellate Assistant Commissioner in respect of the

assessment years 1990-91 to 1992-93. The first appellate authority, however, rejected the contention of the assessee, thereby confirmed the

assessment. Aggrieved by the same, the assessee went on further appeal before the Sales Tax Appellate Tribunal.

5. A reading of the order of the Tribunal shows the following questions raised for its consideration:

- (1) Whether any manufacturing activity is undertaken in Tamil Nadu?
- (2) Whether purchase of bottle caps and seals can be considered as component parts of horlicks powder?
- (3) Whether the Horlicks by itself without packing is marketable or not?
- (4) Because of caps, horlicks powder becomes a new commodity or not?
- (5) Whether section 3(3) is available prior to the amendment of section 3(3) for the packing materials or not?
- (6) Whether section 23 can be invoked in this case or not?

6. As far as the first issue is concerned, the Tribunal came to the conclusion that there was no manufacturing activity done by the assessee to avail

of the benefit of section 3(3) of the Act. As regards the second question as to whether purchase of bottle caps and seals could be considered as

component parts of horlicks powder, the Tribunal viewed that, at best, it could be component part to the bottle which was a container and the

caps itself was not a component part of the manufactured goods. On the third question as to whether Horlicks, by itself, without packing, would be

marketable or not, the Tribunal rejected the assessee's contention and held that Horlicks need not be sold in bottles. In the circumstances, the

Tribunal came to the conclusion that there was violation of the declaration given u/s 3(3) of the Act and hence, in lieu of section 45(2)(e) of the

Act, penalty was levied u/s 23(2) of the Act. Aggrieved by the same, the assessee is before this court.

7. As far as the writ petitions are concerned, as already pointed out, these are also against the order of the Tribunal. The only difference between

the tax case revisions and the writ petition is that in the tax case revisions filed for the assessment years 1990-91 to 1992-93, levy of penalty u/s

23 of the Act was the only issue and the present writ petitions for the assessment years 1994-95 to 1997-98 and 1999-2000 raised a further

question relating to the collection of differential tax between concessional rate and the normal rate. Except for this difference in the assessment

order, practically there are no differences in the facts as regards the claim of concessional levy u/s 3(3) of the Act using form XVII for the purchase

of caps and bottles. It is a matter of record that the Tribunal upheld the assessment on the differential levy but cancelled the levy of penalty under

sections 16(2) and 12(3)(b) of the Act.

8. The assessee has filed these tax case revisions raising the following question of law:

Whether the Sales Tax Appellate Tribunal committed an error of law in confirming the levy of penalty for the assessment years 1990-91 to 1992-

93 u/s 23 of the Tamil Nadu General Sales Tax Act, 1959, on the purchase of caps, seals and labels made by the petitioners from registered

dealers against statutory form XVII declaration contemplated by rule 22(1) of the Tamil Nadu General Sales Tax Rules, 1959, when the use of

caps, seals and labels were integral to the manufacture and marketability of Horlicks powder and also having regard to the definition of

"manufacturer" under rule 3(h) of the Tamil Nadu General Sales Tax Rules, 1959?

9. The learned counsel appearing for the petitioner pointed out to the provisions of section 3(3) of the Tamil Nadu General Sales Tax Act, as it

stood during the relevant assessment years as per Act 44/86 and the provisions u/s 3(3), post-amendment under the Act 25/93, effective from

March 12, 1993. Drawing our attention to the definition of ""manufacturer"" as available under rule 3(h) of the Tamil Nadu General Sales Tax Rules,

learned counsel submitted that given the wide definition of ""manufacturer"" to mean, any person who produces, prepares or makes goods for the

purpose of trade and that the provisions of section 3(3) of the Act includes packing and labelling too, the process which takes the goods to reach

the marketable form would also amount to manufacturer to have the benefit of concessional levy.

10. A reading of the order of the Tribunal shows that the product received in the Chettipunyam factory in intermediary stage undergoes a series of

process so as to make it marketable. To make the goods marketable at the required quality, and to be sold at the measures in the desired

containers, the assessee had to purchase materials, which included the bottle cap as well as labels.

11. The learned counsel for the assessee pointed out that the basic raw materials for the manufacture of Horlicks are wheat flour, malted barley,

malt extract, milk solids and other vitamins and minerals. These are initially mixed and heated in a stainless steel vessel and converted into

concentrated paste in the evaporators. These are later spread on trays and are dried in the oven under vacuum. The dried product passes through

the granulator and mixed with milk powder and vitamins. The product then is passed through magnetic separators to remove fine iron particles, if

any. After verifying the product characteristics including BD, it is packed in polythene bags and sealed in plastic containers. One container contains

184 kgs. of the product. Manufacturing process consists of wet and dry processing. While complete wet processing is done at Rajahmundry, dry

process is partially carried out at Rajahmundry and remaining at Chettipunyam. He further pointed out that though malted barley provides flavour

to the product, it requires maturation time for further development to reach the required flavour. To ensure that the product achieves proper aroma,

they are kept in bulk drums. The samples drawn from the drums, are taken up for sensory evaluation as well as to check bulk density. The product

of different bulk density are mixed together through the vibrator to reach uniform bulk density. Any lump formation is also checked by passing

through vibratory sieve and hard lumps are removed from the product. Iron contamination, thereafter, is removed from the product through

magnetic plates and ultimately, the product is tagged under controlled conditions like relative humidity, vapour pressure and controlled temperature.

Quality of the product is thus maintained through proper environmental conditions packed in consumable marketable quantity in accordance with

the Weights and Measures Act by naming the product, the manufacturer's name, month of packing, batch number, best before date, maximum

retail price and the list of ingredients. Before packing into bottles, the containers are cleaned. To eliminate dust, the bottles pass through the

ultraviolet light tunnel to remove microbial contamination. Ultimately, the products are dispensed through a volumetric filler. The containers are

sealed in three layers, the first layer containing paper, the second layer containing low density polyurethane, and the final layer containing aluminium

to retain the shelf life of the products.

12. Considering the process thus undertaken, in the absence of any definite meaning given in the Act on ""manufacturer"", one has to understand the

term only through the definition of ""manufacturer"" as contained in rule 3(h) of the Tamil Nadu General Sales Tax Rules. In the background of this,

the assessee contends that it is entitled to the benefit of concessional levy and there is no question of levy of penalty u/s 23 of the Act, as though the

assessee had committed violation of terms under form XVII.

13. Per contra, the learned Standing counsel appearing for the Revenue placed reliance on the decisions of the apex court reported in Deputy

Commissioner of Sales Tax (Law), Board of Revenue (Taxes), Ernakulam Vs. Pio Food Packers,) and Crane Betel Nut Powder Works Vs.

Commissioner of Customs and Central Excise, Tirupathi and Another, in support of his contention that there were no manufacturing activity carried

on by the assessee in Chettipunyam unit and hence, the assessee was not entitled to have the benefit of concessional levy in respect of purchase of

caps and labels. Learned standing counsel also placed before us the decision of the apex court in the assessee's own case rendered in C. A. No.

2891 of 1985 dated September 23, 1994 (HMM Limited v. Collector of Central Excise), wherein, the apex court held that screw cap is a

component part of Horlicks bottles and hence, the assessee was entitled to exemption as per the notification under the Central Excise Act. In any

event, learned standing counsel drew support from the reasoning of the Tribunal to contend that the levy of penalty and the differential rate are

justified and legal.

14. Heard learned counsel for the petitioner as well as learned standing counsel for the Revenue and perused the materials available on record.

15. Section 3(3), as it stood at the material point of time, viz., 1990-91 to 1992-93, as amended under Act 44 of 1986, reads as under:

Notwithstanding anything contained in sub-section (1) or sub-section (2), the tax payable by a dealer in respect of sale of any goods, other than

consumables, to another for use by the latter, in the manufacture inside the State for sale by him of any goods:--

mentioned in the First Schedule other than those falling under items 70(b), 70(c) and 107 of the said Schedule

or

involved in the execution of works contract

shall be at the rate of only four per cent on the turnover relating to such sale.

Note : Prior to June 10, 1987, the first proviso to section 3(3) was as follows:

Provided that the provisions of this sub-section shall not apply to any sale unless the dealer selling the goods furnishes to the assessing authority in

the prescribed manner within the prescribed period a declaration duly filled in and signed by the dealer to whom the goods are sold containing the

prescribed particulars in a prescribed form obtained from the prescribed authority.

16. The section underwent changes under Act 25/93 with effect from March 12, 1993 and it remains so during the assessment years 1999-2000.

The section reads as under:

Notwithstanding anything contained in sub-section (2), but subject to the provisions of sub section(1), the tax payable by a dealer in respect of sale

of any goods, including consumables, packing material and labels, but excluding plant and machinery, to another dealer for use by the latter in the

manufacture, and assembling, packing or labelling in connection with such, manufacture inside the State, for sale by him of any goods mentioned in

the First Schedule, other than those falling under item 56 in Part D of the said Schedule and arrack, shall be at the rate of only three per cent on the

turnover relating to such sale:

Provided that the provisions of this sub-section shall not apply to:--

(a) any sale of goods falling under (items 23, 24 and 25 in Part E, items 19 and 20 in Part F) and item 1 in Part H, of the said Schedule; and

Note: The expression "items 23, 24 and 25 in Part E, items 19 and 20 in Part F" was substituted for the expression "items 23, 24 and 25 in Part

E" by Act 33 of 1994 Gazette dated June 16, 1994 effective from April 1, 1994.

(b) any sale, unless the dealer selling such goods furnishes to the assessing authority in the prescribed manner and within the prescribed period, a

declaration duly filled in and signed by the dealer to whom the goods are sold containing the prescribed particulars in a prescribed form obtained

from the prescribed authority:

Provided further that any dealer who, after purchasing the goods in respect of which he had furnished any declaration, fails to make use of the

goods so purchased for the purpose specified in the declaration but disposes of such goods in any other manner, shall pay the difference of tax

payable on the turnover relating to sale of such goods at the rate prescribed and three per cent:

Provided also that the dealer purchasing the goods maintains a separate stock account for each of the goods purchased by him showing such

particulars as may be prescribed.

Note : Sub-section (3) of section 3 was substituted by Act No. 25/93--Gazette dated May 28, 1993--effective from March 12, 1993.

17. Rule 3(h) of the Tamil Nadu General Sales Tax Rules defines ""manufacturer"" as under:

Rule 3(h). "Manufacturer" means any person who produces, prepares or makes goods for the purpose of trade;

18. As far as section 3(3), as it stood during the material point of time relating to assessment years 1990-91 to 1992-93, is concerned, when a

dealer purchases any goods, other than consumables for use in the manufacture of any goods for sale inside the State, the tax payable by a dealer

in respect of such goods, other than the excluded items, would be four per cent. Proviso to section 3(3) enjoins on the assessee to produce a

certificate in form XVII to claim concessional levy. Based on this alone, the" assessee would be entitled to claim concessional levy u/s 3(3) of the

Act.

19. As far as the assessment year 1999-2000 is concerned, in contradistinction to the provisions of section 3(3), which related to sale of any

goods other than the consumables, the amended provisions referred to sale of any goods including the consumables, packing materials and labels

other than capital goods, for the grant of concessional levy. As in the earlier provisions, the only requirement is that raw materials must be used in

the manufacture and assembling and packing materials or packing or labelling in connection with the manufacture of goods, as mentioned in the

First Schedule for sale inside the State. Thus, going by the provisions, it is evident that the tax payable in respect of any goods including

consumables, packing materials and labels, would qualify for concessional levy, so long as they are for the purpose and use in the manufacture of

goods falling under the First Schedule and that the manufactured goods are to be available for sale inside the State.

20. As already seen, there is no definition to as to the scope of the expression ""manufacture"" in the section. Hence, one can get assistance from the

definition of ""manufacture"" as defined under rule 3(h) of the Rules. The said definition was considered by this court in the decision rendered in T.C.

(R) No. 1149 of 2006 dated July 20, 2012 Tamil Nadu Co-operative Milk Producers' Federation Limited v. State of Tamil Nadu [2013] 62

VST 190 (Mad). The said decision was in the context of purchase of polythene films for being used in packing milk and milk products. There, the

assessee purchased fresh milk; after pasteurising it, sold it as a pasteurised milk. In the context of such process done to the milk purchased, the

question arose as to whether the assessee would be entitled to concessional levy on the purchase of polythene sheets. Referring to the decision

reported in M/s. Aspinwall and Co. Ltd Vs. The Commissioner of Income Tax, Ernakulam, as well as to the definition of ""manufacturer"" as

contained in rule 3(h) of the Tamil Nadu General Sales Tax Rules, this court held that the preparation or process of making goods for the purpose

of trade would also be included within the meaning of ""manufacture"" to qualify for concessional levy u/s 3(3) of the Act subject to condition in

section 3(3) of the Act. Thus, when the goods purchased is for the purpose of use in the preparation or a process of the goods for the purpose of

trade, such preparation or process or making of the goods for the purpose of trade would also come within the meaning of ""manufacture"". Such

view would be in consonance with the definition of ""manufacture"" under rule 3(h) of the Tamil Nadu General Sales Tax Rules. Thus, applying the

said decision to the facts of this case, we have no hesitation in holding that when the Horlicks at intermediate stage is brought from Rajahmundry to

Chengalpattu Branch of the assessee-unit in Tamil Nadu, and subjected to several processes to make it a marketable commodity, the assessee can

legally claim its activities in Tamil Nadu, as coming within the meaning of the term ""manufacture"". Given the nature of the product and the

requirements to comply with the provisions of the Weights and Measurements Act with its name and the product code and other details with labels

affixed on the bottle, the entire manufacturing process gets completed only when the goods are brought to such a marketable stage.

21. As far as the decision relied on by the Revenue reported in Deputy Commissioner of Sales Tax (Law), Board of Revenue (Taxes), Ernakulam

Vs. Pio Food Packers, is concerned, the same relates to the purchase tax provisions under the Kerala General Sales Tax Act. As far as the

decision reported in Crane Betel Nut Powder Works Vs. Commissioner of Customs and Central Excise, Tirupathi and Another, is concerned, the

same has no relevance to the facts herein. Considering the absence of the definition of ""manufacture"", the liability to tax has to be seen only in terms

of the definition available on the term ""manufacture"" under the Rules and the same cannot be examined in the context of the provisions of other

enactments. In the circumstances, the decisions relied on by the Revenue are distinguishable and have no relevance to the case on hand. In the light

of the above, this court holds that the purchase of labels and caps are integral to the manufacturing activity and for the purpose of trade. Going by

the decision of the apex court in the assessee's own case rendered in C. A. No. 2891 of 1985 dated September 23, 1994 (HMM Limited v.

Collector of Central Excise), holding that screw cap shall be deemed to be a component part of Horlicks and hence, the assessee is entitled to the

concessional excise levy, the tax case (revisions) are allowed and so too the writ petitions. The order of the Tribunal levying penalty is set aside

and the differential duty collected by reason of section 3(3) of the Act is also deleted. The writ petitions are allowed. No costs.