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* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

Date of decision: 5th October, 2012

+ ST.APPL. 3/2012

VARUN BEVERAGES LTD Petitioner

Through: Mr.Rajesh Jain, Advocate

versus

COMMISSIONER OF VALUE ADDED TAX Respondent

Through: Mr.Vineet Bhatia, Advocate

CORAM:

MR. JUSTICE S. RAVINDRA BHAT

MR. JUSTICE R.V.EASWAR

S. RAVINDRA BHAT, J.: (OPEN COURT)

1. The present appeal questions a decision of the Appellate Tribunal, Value Added Tax, Delhi, (Tribunal, for short), dated 20.12.2011 in Appeal No. 240/ATVAT/07-08. The question urged is whether the Tribunal's decision, concluding that the appellant's fruit pulp based drink, known as "Slice" is correctly classifiable as a "food article" under Entry 47 of the First Schedule and taxable @ 12% under Section 4(1)(a) or is taxable under the residuary entry under Section 4(1)(d) of the Delhi Sales Tax Act, 1975 (Act, for short).

2. The brief facts are that the appellant, a dealer, trades in aerated

drinks, mineral water and fruit pulp based drink, known as “Slice”. It sought to deposit sales tax, at 8%, contending that the item was not covered in any of the specific entries, and therefore, taxable in the residuary entry. The department, on the other hand, contended that the item is classifiable as food article under Entry 47 of the First Schedule and taxable at 12%, the tax demand for the balance, against which the dealer appealed to the higher authority, i.e., Joint Commissioner. The latter, however, upheld the order of the assessing authority, classifying the item as “Food Article” under Entry 47 of the First Schedule. Its appeal to the Tribunal too was similarly rejected.

3. The appellant contends in the pleadings and its counsel urges that the reasoning of the Tribunal that the fruit pulp based drink amounts to a “Food Article” is unacceptable. The counsel submits that reliance placed upon by the lower authorities and endorsed by the Tribunal, on the definition of “food article” under the Prevention of Food Adulteration Act, 1954 was misplaced. It was submitted, in this regard, that the object sought to be achieved by the Prevention of Food Adulteration Act, 1954 is to ensure safety of the consumer and impose minimum standards. However, the objectives of the Delhi Sales Tax Act, 1975 or any other fiscal statute for that matter, having regard to

the diverse nature of the objectives, it is not a sound canon of construction to import the definition of one enactment for the purpose of another, which is wholly for a different purpose, which seeks to achieve an entirely different purpose. In this regard, learned counsel relied upon the “common parlance test” and for this purpose relied upon the judgment of the Calcutta High court in *Union of India v. Kalyani Breweries Ltd.* 1999(113) ELT 39 (Cal.), *Hindustan Aluminium Corporation v. State of U.P.* : (1982) 1 SCR 129, *CIT v. Taj Mahal Hotel* (1971) 3 SCC 550 and *State of Gujarat v. Gokaldas Trading Co.* (1991) 82 STC 248 (Guj); and *S.Samuel, M.D., Harrisons Malayalm and Anothers v. Union of India and Others*, 2003 (134) STC 610 (SC).

4. Learned counsel for the appellant argued that the composition of the item, i.e., fruit pulp based drink is pre-dominantly water based. The counsel relied upon its written submissions made before the Tribunal which stated that the product “Slice” has a composition of 69.52% water, 1.08% Alfonso mango, 15.56% Totapari mango, 13.05% sugar, 0.79% preservatives and concentrate flavours/salts etc. It was submitted that the term “food” connotes an article or substance which primarily immediately nourishes the human body.

5. In this regard, learned counsel relied upon a decision in **S. Samuel** (*supra*) in terms of the New Encyclopaedia Britannica (15th edition, volume 25, Page 49) to the effect that :

“Functions of food:

Food serves three functions in most living organisms. First, it provides materials that are metabolized either by oxidative or by fermentative processes to supply the energy required for the absorption and translocation of nutrients, for the synthesis of cell materials, for motility and locomotion, for excretion of waste products, and for all other activities of the organism. Second, food supplies the electron donors (reducing agents) required for the formation of the reduced coenzymes (enzyme components) necessary for the synthetic processes that occur within the cell. Third, food provides the materials from which all of the structural and catalytic components of the living cell can be assembled by processes sometimes called anabolism. The three roles of food are not mutually exclusive; energy-yielding substances in many organisms may function in all three ways, and essential nutrients, if present in excess, may frequently be metabolized to supply energy.

The essential precursors (i.e., the substances from which other substances are formed) of cell materials can be divided into two groups— non-essential nutrients, which can be synthesized by the cell from other materials, and essential nutrients, which, because they cannot be synthesized by the cell, must be supplied in foods. All of the

inorganic materials required for growth, together with an assortment of organic compounds whose number may vary from one to 30 or more, depending on the organism, fall into the latter category. Although organisms are able to synthesize non-essential nutrients, such nutrients are frequently utilized directly if present in food, thereby saving the organism the need to expend the energy required to synthesize them.”

6. It was argued that the Tribunal's findings consequently cannot be upheld. It was argued in addition that the statute, Delhi Sales Tax Act, 1975 in this case, had not clearly classified drinks separately. Learned counsel drew the attention of the Court to the Fourth Schedule to the Act which listed liquor (both foreign and Indian made liquor, Item 2), Country liquor (Item 3) and aerated drinks (item 8). It was submitted that since beverages or a part of them were within the contemplation of the legislature, non-provision of other kinds of beverages which fall within other description, (i.e., other than those mentioned in the Fourth Schedule) would imply that common parlance test has to be applied in the case of Entry 47 of First Schedule and the court should hold that the mango pulp based drink in this case is not a food article.

7. Learned counsel for the Revenue submitted that no interference is called for with the order of the Tribunal. He relied upon the dictionary meaning of “food”. He submitted that even according to the dictionary, “food” would mean any nourishing substance that is eaten, drunk or otherwise taken into the body to sustain life, provide energy, promote growth, etc. It was submitted that the words in Entry 47 of First Schedule have to be seen in the context of the backdrop of a fiscal statute. The expression “food article” has to be given its widest meaning, so seen, the counsel submitted that there is no dispute that the drink “Slice” is meant for human consumption and it provides sustenance to the individual who consumes it. The counsel also relied upon the decision reported in *Pepsico India Holdings Private Ltd. v. State of Assam & Others* [2009] 25 VST 41 (Gau) where the Court had to say that the task of construing a statute has to be based on the objectives sought to be achieved by the taxing enactment. In that case, the question which arose was whether potato chips manufactured and sold by the assessee were processed or “preserved vegetables and fruits”.

8. The High Court had relied upon *Dunlop India Limited & Madras Rubber Factory Ltd. v. Union of India* 1983 (13) ELT 1566

(SC) where it was held that when an article is by all standards classifiable under a specific item in the Tariff Schedule it would be against the very principle of classification to deny it the parentage and consign it to an orphanage of the residuary clause.

9. Learned counsel emphasized that the product in question, i.e., mango drink, in this case, corresponded closely to the entry of the food and drinks in question, i.e., food article in Entry 47 of the First Schedule, therefore, cannot be taxed under the residuary entry i.e. “orphanage”. It is therefore submitted that the Tribunal’s findings are unexceptionable and do not call for an interference.

10. For a better appreciation of the controversy in this case, it would be necessary to extract the relevant items relating to food drinks, beverages etc. in the Schedules to the Delhi Sales Tax Act, 1975:

ITEMS RELATING TO FOOD & DRINKS

First Schedule

ENTRY NO.	Item
33.	Meat, fish, fruits and vegetables when sold in preserved form
47.	All kinds of preserved food articles when sold in sealed containers

ITEMS RELATING TO FOOD & DRINKS

Second Schedule

ENTRY NO.	Item
13.	Vegetable, fruits, fish and meat not covered by another entry in any other Schedules appended to the Delhi Sales Tax Act, 1975

ITEMS RELATING TO FOOD & DRINKS

Third Schedule

ENTRY NO.	Item
4.	Cooked food served in small dhabas
5.	Meat and fish other than canned, preserved, processed, dried, dehydrated, frozen, cooked or sold in sealed containers.
6.	Fresh eggs
7.	Vegetables and fruits other than canned, preserved, processed, dried, dehydrated, frozen, cooked or sold in sealed containers.
10.	Fresh milk and pasteurized milk, but not including condensed milk, milk powder or baby milk
11.	Dahi (curd), lassi and butter milk

ITEMS RELATING TO FOOD & DRINKS

Fourth Schedule

ENTRY NO.	Item
2.	Liquor (foreign and Indian made foreign liquor).
3.	Country liquor
8.	Aerated drinks

11. The expression “preserved food articles” calls for interpretation in this case. As noticed previously there is no specific entry which

deals with the beverages or for that matter fruit based drinks or juices; however, there is some legislative indication as far as liquor and concentrated drinks are concerned. The question is, therefore, that the Court had to address whether a mango pulp based drink, is a “food article” within the meaning of the expression under Entry 47 of the First Schedule.

12. During the hearing, the learned counsel for the dealer/appellant had relied upon the judgment of Gujarat High Court i.e. ***Gokaldas Trading co. (supra)***. The Court there had to deal with the Entry which reads as follows “ food stuff and food provisions of all kinds” in the context of the malted drink ‘Bournvita’. The Court noticed the previous decision of the Supreme Court in ***State of Bombay v. Virkumar Gulabchand Shah*** 1952 AIR 335 SC where the Supreme Court had to deal with the expression “food stuff”. The Supreme Court had then held that the entry in question was limited to those articles which are “eaten as food”. More pertinently the Gujarat High Court in a previous ruling in ***State of Gujarat v. Sarabhai Chemicals*** [1971] 27 STC 170, held that if an article is normally eaten or if it can be offered as food to a normal person who is found hungry then it would be regarded as a food stuff or food provision but not otherwise.

On the facts of that case, i.e., Bournvita was classified as food stuff.

The Gujarat High Court concluded as following:

“ Keeping in mind the interpretation of the words “food-stuff and food provision” and the test laid down by this Court in Sarabhai Chemicals’ case [1971] 27 STC 170, we will have to decide whether Bournvita can be said to be “food-stuff or food provision”. Though it is described as a food drink it is not a substitute for food. Though Bournvita can be taken every day, it is not taken as a food but only as a nutritive element. It is not taken by a person who is hungry as food for the purpose of satisfying his hunger. It is not taken alone but is to be taken with milk. At the most, it makes a delicious food drink when it is taken along with milk. Merely because it supplies some nourishment and sustenance, it cannot be equated with food-stuff or food provision. It is not used by common people and is not normally taken as food by normal persons. It is, therefore, difficult to accept the contention of the learned Assistant government Pleader appearing for the State that since it is described by the manufacturers themselves as a food drink, it should be regarded as a food-stuff or a food provision. We are, therefore, of the opinion that the Tribunal was right in holding that as Bournvita is neither a food-stuff nor a food provision, it would not be covered by entry 6 of Schedule III but by residuary entry 13 of Schedule II to the Act.”

13. It would therefore be evident that the Gujarat High Court had

followed the Supreme Court and had adopted the common parlance test to determine whether the term “food stuff” in the fiscal statute, like in the present case, included a malted drink concentrate, i.e. Bournvita.

14. At this stage, it would be necessary to notice the observations of the Supreme court in ***Virkumar Gulabchand (supra)***. The relevant extract of that decision is as follows

“ Much learned judicial thought has been expended upon this problem- What is and what is not food and what is and what is not a foodstuff, and the only conclusion I can draw from a careful consideration of all the available material is that the term “foodstuff” is ambiguous. In one sense it has a narrow meaning and is limited to articles which are eaten as food for purposes of nutrition and nourishment and so would exclude condiments and spices such as yeast, salt, pepper, baking powder and turmeric. In a wider sense, it includes everything that goes into the preparation of food proper (as understood in the narrow sense) to make it more palatable and digestible. In my opinion, the problem posed cannot be answered in the abstract and must be viewed in relation to its background and context. But before I dilate on this, I will examine the dictionary meaning of the words. The Oxford English Dictionary defines ‘foodstuff’ as follows: “ that which is taken into the system to maintain life and growth and to supply waste of tissue.

In Webster's international Dictionary 'food' is defined as: "nutritive material absorbed or taken into the body of an organism which serves, for purposes of growth, work or repair and for the maintenance of the vital processes."

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So far as "food" is concerned, it can be used in a wide as well as a narrow sense and, in my opinion, must depend upon the context and background. Even in a popular sense, when one asks another "have you had your food?" , one means the composite preparations which normally go to constitute a meal-curry and rice, sweetmeats, pudding, cooked vegetables and so forth. One does not usually think separately of the different preparations which enter into their making, of the various condiments and spices and vitamins, any more than one would think of separating in his mind the purely nutritive elements of what is eaten from their non-nutritive adjuncts.

So also, look at from another point of view, the various adjuncts of what I may term food proper which enter into its preparation for human consumption in order to make it palatable and nutritive, can hardly be separated from the purely nutritive elements if the effect of their absence would be to render the particular commodity in its finished state unsavoury and indigestible to a whole class of person whose stomachs are accustomed to a more spicily prepared product. The proof of the pudding is, as it were, in the eating, and if the effect of eating what would other be palatable and digestible

and therefore nutritive is to bring on indigestion to a stomach unaccustomed to such unspiced fare, the answer must, I think, be that however nutritive a product may be in one form it can scarcely be classed as nutritive if the only result of eating it is to produce the opposite effect; and if the essence of the definition is the nutritive element, then the commodity in question must cease to be food, within the strict meaning of the definition to that particular class of person, without the addition of the spices which make it nutritive. Put more colloquially. "one man's food is another man's poison". I refer to this not for the sake of splitting hairs but to show the undesirability of such a mode of approach. The problem must, I think, be solved in a commonsense way."

15. This Court notices that in ***Collector of Central Excise V. Parle Exports (P) Ltd.***:1988(38) ELT 741 (SC), the issue involved was whether the examination of kinds of food products and food preparations included a non-alcoholic brewery base. The Court adopted the common parlance theory and held as follows :

"The expressions in the Schedule and in the notification for exemption should be understood by the language employed therein bearing in mind the context in which the expressions occur. The words used in the provision, imposing taxes or granting exemption should be understood in the same way in which these are understood in ordinary parlance in the area in which the

law is in force or by the people who ordinarily deal with them.”

16. In ***Kalyani Breweries (supra)*** the proposed question was whether beer was a “food article”. Considerable arguments were sought to be addressed before the Court suggesting that beer had nutritive properties and nourishes the human body. The Calcutta High Court again applied the common parlance test and held that beer was not a food article. Likewise, in ***S.Samuel (supra)*** case the question was whether the tea was a food article wherein the Supreme Court concluded that it was not.

17. From the above discussion, it is apparent that by now the applicable test which has to be adopted to judge whether an entry in a taxing statute comprehends one or other article, is the common parlance test, so articulately spelt out in ***Virkumar Gulabchand (supra)***. Consequently, the Tribunal’s approach in seeking recourse to the definition under the Prevention of Food Adulteration Act, was misplaced. There is no reference under the Delhi Sales Tax Act imposing such definition. The objectives of both enactments are diverse and varied. This Court is of the opinion that the pre-dominant contents of the mango pulp drink, in this case, is water (70%). The

mango pulp content is 17%. This product does not claim to be a fruit juice and, therefore, the Revenue cannot urge that it has even a minimum modicum of nutritive properties. Arguably, if the product was entirely milk based, the considerations might have been different. However, the mango pulp based drink, in this case, is at best an instant energy giver and in all cases a thirst quencher; by no stretch of imagination can it be called a “food article” at least not within the contemplation of the statute, by an application of the common parlance test.

18. In view of the above, it is held that the impugned order classifying the concerned product, i.e., mango pulp based drink, is not classifiable in Entry 47 of First Schedule and would be taxed in residuary entry, at the rate mentioned in Section 4(1) (d) of the Delhi Sales Tax Act, 1975. The necessary consequential orders by the respondent authorities or refund, if any, shall be made/offered to the petitioner within 8 weeks. Appeal is allowed in the above terms with no order as to costs.

S. RAVINDRA BHAT, J

R.V.EASWAR, J

OCTOBER 05, 2012/SV