AFR

HIGH COURT OF CHHATTISGARH, BILASPUR

Writ Petition (T) No. 2672 of 2008

1. R. M. Marketing Agencies, Naharpara Station Road, Raipur (CG) through proprietor Piyush Sethia S/o Narendra Kumar Sethia aged about 28 years
2. Shreyans Kumar Sethia S/o Narendra Kumar Sethia, aged about 33 years, resident of Naharpara, Station Road Raipur (CG) power of attorney of R. M. Marketing Agencies

---- Petitioners

Versus

Commissioner of Commercial Tax, Chhattisgarh Vinijyik Kar Bhavan, Civil Lines, Raipur (CG)

---- Respondent

For Petitioner	:	Ms. Smiti Sharma, Advocate
For Respondent/State	:	Shri D. R. Minj, Govt. Advocate

Hon'ble Shri Justice P. Sam Koshy

Order On Board

25/10/2017

The issue involved in the present writ petition is whether Vasmol Yogiraj Ayurvedic Oil (Thanda Tel) is a drug/medicinal product or not?

2. The present is a petition under Article 226 of the Constitution of India assailing the order dated 31.07.2006 passed by the Commissioner, Commercial Tax, Chhattisgarh on an application under Section 70 of the Chhattisgarh Value Added Tax Act (hereinafter referred as " CG VAT Act").

3. Section 70 of the CG VAT Act envisages the provisions wherein an application can be moved before the Commissioner, Commercial Tax to seek clarification in respect of the rate of tax on any goods.

4. The petitioner firm herein is a proprietor concern and is a dealer of an Aurvedic oil under the brand name of Vasmol Yogiraj Ayurvedic Oil (Thanda Tel). The said product is manufactured by M/s Sanjog Herbs & Foods (I) Pvt. Ltd., Maharashtra. The petitioner firm had applied before the Commissioner, Commercial Tax, Chhattisgarh for determination of rate of tax of the aforesaid product under CG VAT Act. The Commissioner vide its order dated 31.07.2006 Annexure P-4 ordered that the product would fall under Part-4 of Schedule II and as such the rate of tax applicable on the said product would be 12.5%. The petitioners subsequently moved an application for rectification of the order dated 31.07.2006 but the same was also rejected vide order dated 05.06.2007 leading to the filing of the present petition.

5. The contention of the learned counsel for the petitioner is that the product is a medicinal item and would fall under Entry 42 Part II Schedule II of Chhattisgarh VAT Act. That the product being a medicinal item is established from the licence itself which has been issued in favour of the manufacturer by the Food and Drug Administration, Government of Maharashtra. The licence issued in favour of the manufacturer itself reflects the ingredients in the product, its Latin name and the text reference of each of the ingredients. The licence bears the name of the product as "Vasmol Yogiraj Ayurvedic Tel" and it is mentioned in the licence itself as an Ayurvedic Proprietory Medicine. The licence also reflects the indication and uses of the said product, all of which would clearly reflect it to be a medication item. Thus, the product would fall under Entry 42 of Part II of Schedule II of the CG VAT Act. It was also the contention that the very same product has been accepted as an Ayurvedic medicament/Ayurvedic medicine by the Govt. of West Bengal by its Commercial Tax Department as is evident from the order passed on a pari materia provision under the West Bengal Value Added Tax Act where the Commissioner has vide its order dated 11.07.2006 accepting it as a drug and medicine prescribed the rate of tax applicable to be 4%.

6. According to the counsel for the petitioners, the product is an oil with lot of medicinal contents and is an Ayurvedic product manufactured on the basis of the materia medica collected from Ayurved text and as such for all practical purposes it is a drug for the purpose of Entry 42 and it has to be given a wide connotation. Counsel for the petitioners referring to the impugned order dated 31.07.2006 submitted that all the grounds on the basis of which the order has been passed are not sustainable. According to the counsel for the petitioners, similar issue has been dealt with by the Supreme Court as well as by various High Courts under different provisions of law pertaining to similar products and in all the cases, it has been held that the product is an Ayurvedic medicine. Based upon these judgments and also on the basis of the order of the Commissioner, Commercial Tax, Govt. of West Bengal, the petitioners sought for the impugned order to be set aside and a writ be issued holding that the product Vasmol Yogiraj Ayurvedic Oil (Thanda Tel) is a product which is liable to be taxed at 4% treating it as a drug/medicine under Entry 42 Part II Schedule II of the CG VAT Act.

7. The learned State counsel, on the contrary, opposing the petition submits that the product is nothing but a simple hair oil though it may have certain Ayurvedic contents but the same definitely would not fall under the definition of either drug or medicine and at best it could be a cosmetic item. According to the State Counsel, the product does not have any power of treating a particular disease nor is it prescribed as a medicine for curing any ailment. Even if it has Ayurvedic ingredients that by itself would not make it a medicinal product or a drug. It was contended by the State counsel that for the purpose of tax collection, the provisions of the Schedule have to be strictly adhered to. In the instant case, since the product is not a drug for a particular disease or ailment, it has to be considered only as a simple Ayurvedic hair oil. It was further contended that the product is not a drug or medicine as is evident from the fact that the product is sold in the open market at different counters and can be purchased without any sort of prescription from a doctor and it also does not appear to be a product based on traditional Ayurvedic text.

State counsel submitted that the judgments which have been referred by the counsel for the petitioners are the judgments which have been passed under different statutes and therefore the same cannot be made applicable in the present case. State counsel relied upon the decision of the Supreme Court in the case of Dabur India Ltd. V. Commissioner of Sales Tax, Orissa and others, 2004 (35) STC 187. He also relied upon the decision of the Madras High Court in the case of V. C. Ramalingam & Sons and another Vs. State of Tamil Nadu and others, 2002 Sales Tax Cases 382 and also the decision of the Supreme Court in the case of Alpine Industries Vs. Collector of Central Excise, 2003 Sales Tax Cases 9.

8. The Supreme Court in the case of Commissioner of Central Excise, Calcutta Vs. Sharma Chemical Works reported in (2003) 5 SCC 60 in a similar set of facts pertaining to a product named “Banphool Oil” has dealt with the issue quite elaborately. The dispute in the said case was whether the said product was a “perfumed hail oil” or an “Ayurvedic Medicament”. The contention of the Excise Department was that it was a cosmetic item whereas the respondent had been harping on the product being an Ayurvedic drug. In paragraph-12, the Hon'ble Supreme Court has held as under:

> “We have heard the parties and considered the submissions made by them. We have also read the opinion of the majority Bench and the minority opinion of the Technical Member. It is a settled law that the onus or burden to show that a product fall within a particular Tariff Item is always on the revenue. Mere fact that a product is sold across the counters and not under a Doctors prescription does not by itself lead to the conclusion that it is not a medicament. We are also in agreement with the submission of Mr. Lakshmikumaran that merely because the percentage of medicament in a product is less does not ipso facto mean that the product is not a medicament. Generally the percentage or dosage of the medicament will be such as can be absorbed by the human body. The medicament would necessarily be covered by fillers/vehicles in order to make the product usable. It could not be denied that all the ingredients used in Banphool Oil are those which are set out in the Ayurveda text Books. Of course the formula may not be as per the text books but a medicament can also be under a patented or proprietary formula. The main criteria

> for determining classification is normally the use it is put to by the customers who use it. The burden of proving that Banphool Oil is understood by the customers as an hair oil was on the revenue. This burden is not discharged as no such proof is adduced. On the contrary we find that the oil can be used for treatment of headache, eye problem, night blindness reeling head weak memory, hysteria amnesia blood pressure, insomnia etc. The dosages required are also set out on the label. The product is registered with Drug Controller and is being manufactured under a drug licence."

9. Again the Supreme Court had an occasion of considering another case i.e. the case of Commissioner of Central Excise, Calcutta-IV Vs. Pandit D. P. Sharma, (2003) 5 SCC 288 under the provisions of Central Excise Act. This time the product was "Himtaj Oil". In this case, the Supreme Court rejecting the submission put forth by the Revenue and accepting the proposition of law laid down by it in the case of Sharma Chemical Works (supra) dealing with the product "Banphool Oil" has upheld the judgment of the CEGAT, Calcutta.

10. Again in the matter of Puma Ayurvedic Herbal (P) Ltd. Vs. Commissioner, Central Excise, Nagpur reported in (2006) 3 SCC 266, the Supreme Court while dealing with the issue has laid down two tests to determine whether it would be a cosmetic product or a drug/medicament. The two tests are reproduced hereinunder:

> "2.....….The tests are:
> I. Whether the item is commonly understood as a medicament which is called the common parlance test. For this test it will have to be seen whether in common parlance the item is accepted as a medicament. If a product falls in the category of medicament it will not be an item of common use. A user will use it only for treating a particular ailment and will stop its use after the ailment is cured. The approach of the consumer towards the product is very material. One may buy any of the ordinary soaps available in the market. Bit if one has a skin problem, he may have to buy a medicated soap. Such a soap will not be an ordinary cosmetic. It will be medicament falling in Chapter 30 of the Tariff Act.
> II. Are the ingredients used in the product mentioned in the authoritative textbooks on Ayurveda?"

11. According to the petitioners, in the present case also Vasmol Yogiraj Ayurvedic Tel is one similar oil. It is not a product of common use. Only those who want a particular relief from the product will go for it. According to the counsel for the petitioners, the product is also one which has specific reference to the Ayurvedic textbooks and the ingredients used for manufacturing of the same are also like shrubs, herbs, leaves, fruits, nuts, flowers, wood etc. At this juncture, counsel for the petitioners took the Court again to the licence which has been issued to the manufacturer of the product wherein the Ayurvedic text is also referred while discussing with the components with which the product is manufactured. It was therefore the duty and burden which is casted upon the Revenue to show and establish that the product in question was not a medicament but was a cosmetic or a toilet preparation product.

12. In the case of Puma Ayurvedic Herbal (P) Ltd. (supra) in paragraphs -17 & 18 referring to the case of Dabur India Ltd., the Supreme Court has held as under:

> "17. Lastly we were referred to Dabur India Ltd. v. CCE 2005 (182) ELT 290 (SC). This is a judgment of three Judge Bench of this Court and the products under consideration were Janam Ghunti and Lal Tail. Regarding Lal Tail, this Court held that it was liable to be classified as medicament under Chapter 30 as all its ingredients were found to be in Ayurvedic texts.
> 18. From the above judgments it follows that the law is settled on the applicability of the twin test for determination of classification of a product. We have already found that the twin test is satisfied in the present case regarding most of the items under consideration."

Again referring to the judgment of Sharma Chemical Works (supra) and also certain other subsequent decisions, the Supreme Court in paragraphs 21 & 22 in Puma Ayurvedic Herbal (P) Ltd. (supra) while considering the ground of the product being sold in the open market has held as under:

> "21. The extent or the quantity of medicament used in a particular product will also not be a relevant factor. Normally, the extent of use of medicinal ingredients is very low because a larger use may be harmful for the human body. The medical ingredients are mixed with what is in the trade parlance called fillers or vehicles in order to make the medicament useful. To illustrate an example of Vicks Vaporub is given in which 98% is said to be paraffine wax, while the medicinal part i.e. Menthol is only 2%. Vicks Vaporub has been held to be medicament by this Court in CCE vs. Richardson Hindustan Ltd. 1989 (42) ELT A100.

Therefore, the fact that use of medicinal element in a product was minimal does not detract from it being classified as a medicament.
22. In order to be a medicinal preparation or a medicament it is not necessary that the item must be sold under a doctor's prescription. Similarly availability of the products across the counter in shops is not relevant as it makes no difference either way."

13. The Kerala High Court, in the case of State of Kerala Vs. Tips and Toes Cosmetics India Ltd.[1] in an issue pertaining the product "Kajal" in paragraph-4 has held as under:

"4. We have considered the rival submissions and also perused the orders of the three authorities. The only question as already noted is as to whether the Kajal is an ayurvedic preparation drug or whether it is a cosmetic. The Tribunal had noted the contentions of the assessee and had also perused the photocopy of the drug licences issued to the manufacturers of Kajal which showed that Shingar Kajal is an ayurvedic preparation. The Tribunal also relied on its earlier decision in Ramachandran's case which has been affirmed by this Court. Of course, this Court in Ramachandran's case [1998] 6 KTR 65 had upheld the finding of the Tribunal based on the drug licence and the affidavits filed by the three medical practitioners to the effect that they used to prescribe the product of the assessee for illness of eyes. The Division Bench also noted in the said judgment that no evidence was adduced on the side of the revenue controverting the case put forward by the assessee regarding the nature of its products. In the present case also, the assessee had explained the nature of its product and had also produced the drug licence issued under the Drugs and Cosmetics Act to the manufacturers of Kajal which showed that the Shingar Kajal is an ayurvedic medicine."

14. The Rajasthan High Court again in the case of State of Rajasthan and Anr. Vs. Deys Medical Stores Ltd. and Anr.[2] dealing with the product "Keo Karpin Hair Vitalizer" and "Keo Karpin Baby Oil" referring to the decision on the subject matter in paragraphs – 26 & 27 has held as under:

"26. Applying the tests laid down by the Supreme Court in the case of B.P.L. Pharmaceuticals Limited and followed in the matters of "Banphool Hair Oil', 'Himtaj Oil' and Maha Bhringraj Oil', it cannot be said that the finding of the Taxation Tribunal that the products viz., 'Keo Karpin Hair Vitalizer' and 'Keo Karpin Baby Oil' fall in the entry 60 and not the entry 69 of the afore-referred notification suffers from any error of law.
27. Before we close, we may notice that the counsel for the department submitted that both these products are sold across the counter and these are not required to be sold on the doctor's

[1] (2008) 11VST74(Ker) = MANU/KE/0848/2003
[2] RLW2008(1)Raj432 = MANU/RH/0598/2007

> prescription and, therefore, these products do not fall in entry 60. The submission is without any substance. As a matter of fact, this very argument has been rejected by the Supreme Court in the case of Banphool Hair Oil. The Supreme Court held that mere fact that a product is sold across the counters and not under a Doctor's prescription, does not by itself lead to the conclusion that it is not a medicament."

The Rajasthan High court recently in the case of Assistant Commissioner, Commercial Taxes Department, Circle-A and Ors. Vs. Khandelwal Drug Agencies[3] in paragraph-10 has held as under:

> "10. On perusal of the above, in my view, any drug for even prevention of disease or disorder in human beings or animals, and is manufactured exclusively in accordance with the formulae prescribed in the authoritative books, can be said to fall within the definition of a "drug"."

15. In view of the aforesaid legal provisions, this Court has no hesitation in reaching to the conclusion that in the instant case also, the manufacturer has a licence for manufacturing Vasmol Yogiraj Ayurvedic Oil (Thanda Tel) reflecting it as an Ayurvedic proprietary medicine. Further the licnece also reflects the authoritative text on Ayurved. The product by no means could be said to be either cosmetic or a toilet preparation or an ordinary drug. What also strengthens the case of the petitioners is the document/order issued by the Govt. of West Bengal on the same product wherein they have accepted it as an Ayurvedic drug. The judgments referring to in the preceding paragraphs practically deals with all the contentions which have been raised by the State Government opposing the petition.

16. In view of the authoritative decisions discussed in the preceding paragraphs coupled with the order of the Govt. of West Bengal for the said product, this Court reaches to the conclusion that the order passed by the Commissioner, Commercial Tax, Chhattisgarh dated 31.07.2006 and also the order dated 05.06.2007 whereby the rectification application was rejected by the Commissioner are not proper and legal and the same deserve to be set aside. It is held that the product Vasmol Yogiraj Ayurvedic Oil (Thanda Tel)

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would fall under the category of medicine/drug under Entry 42 of Part II of Schedule II of the CG VAT Act, 2005 and would therefore be taxable at which the drugs and medicines are taxed.

17. Accordingly the present writ petition stands allowed. The two orders dated 31.07.2006 and 05.06.2007 Annexures P-4 & P-5 passed by the Commissioner, Commercial Tax, Chhattisgarh stand set aside/quashed with the consequences to follow.

Sd/-
(**P. Sam Koshy)**
JUDGE

Bhola