IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 14.11.2019

CORAM:

THE HONOURABLE DR.JUSTICE VINEET KOTHARI
AND
THE HONOURABLE MR.JUSTICE C.SARAVANAN

W.P.No.25620 of 2002

The State of Tamil Nadu
Represented by
The Deputy Commissioner (CT)
Chennai South Division
Chennai - 6. .. Petitioner

Vs

1.Tvl.Asiatic Oxygen Ltd.
No.4, M.T.H.Road
Chennai - 50.

2.The Secretary
The Tamil Nadu Sales Tax
Appellate Tribunal (MB)
Chennai - 104. .. Respondents

Writ Petition filed under Article 226 of the Constitution of India praying to issue of Writ of Certiorari, calling for the records on the file of the second respondent pertaining to the order dated 23.03.2001 made in T.A.No.838/98 and quash the same as illegal.

For Petitioner : Ms.Dhanamadhri,
Government Advocate.

ORDER

[Order of the Court was made by Dr.VINEET KOTHARI, J]

The learned counsel appearing for the petitioner/Revenue submits that the controversy involved in the present case is covered by the Division Bench of this Court in the case of State of Tamil Nadu Vs. Ram Oxygen (Pvt.) Ltd. and another reported in 2010 SCC Online Mad 6411 : (2010) 35 VST 478, in which the Division Bench has held that “medical oxygen” is a “drug” and not a “gas” and is therefore, taxable at a concessional rate. Paragraphs 10 and 11 of the said judgment is quoted below for ready reference:

"10. Subsequently, when entry 20A came to be inserted in Schedule I, Part C in the year 1993, the reading of the said entry shows that in effect, the definition of "drug" has been more or less bodily lifted into the said entry. It is also not in dispute that the "medical oxygen" has got 99.9 per cent purity of purified oxygen and that its use is only for treatment of patients and to mitigate contrary intensity of any disease or disorders in human being. It is common knowledge at times of emergency/the application of "medical oxygen" to a patient is restored to in order to prevent any sudden collapse of a patient, which process is nothing but part of a treatment meted out to a patient to recoup the deterioration of health condition. Therefore, keeping the above basic features in mind, the tests laid down by the Hon'ble Supreme Court in the decision in State of Goa V. Leukoplast (India) Ltd., [1997] 105 STC 318, have to be applied. The tests laid down are as under:

(i) What is the medicinal contents of the product has to be ascertained;

(ii) Further it is curative function has to be found out to decide whether the product can be called a medicament at all.

(iii) Finally, it should be verified as to whether it is used to cure or alleviate or to prevent disease or to restore health or to preserve health hazard.

11. Having regard o the use of "medical oxygen" to a patient, as rightly concluded by the Additional Appellate Assistant Commissioner, the "medical oxygen" would positively satisfy the above three tests laid down by the Hon'ble Supreme Court. Therefore, when once the said findings of the Appellate Assistant Commissioner, as regards the nature of product viz., "medical oxygen" has been noted, it would be travesty of justice to still hold that would be falling under the category of "gas" and not under the category of entry 95, 20A of Schedule I in the years 1991 to 1993. Therefore, the ultimate conclusion of the Tribunal in the orders impugned in setting aside the order of the Appellate Assistant Commissioner, cannot be found fault with. We are not therefore, inclined to interfere with the said order. Moreover, the said issue is directly covered by the decision of Kerala High Court in Southern Gas Ltd. Vs. State of

Kerala, [2005] 139 STC 504 as the provisions are in pari materia. In the said circumstances, applying the said decision also we have no hesitation to hold that the "medical oxygen" would fall only under entry 95 as of the year 1991 and under entry 20A as of the year 1993 and will not fall under entry 106 as of the year 1991 and entry 25 as of the year 1993 as contended by the petitioner. We therefore, do not find merit in these tax case revisions as well as the writ petitions and the same fail and are dismissed. No costs."

2. In view of the aforesaid judgment of the Division Bench of this Court, the writ petition filed by the State against the order of the Appellate Assistant Commission (CT) VI, Chennai as well as the Tamil Nadu Sales Tax Appellate Tribunal, Chennai - 104, is liable to the dismissed and the same is accordingly dismissed. No costs.

Sd/-
Assistant Registrar(CS-VIII)

// True Copy//

Sub Assistant Registrar

vsm

To

1.The Secretary,
The Tamil Nadu Sales Tax,
Appellate Tribunal (MB),
Chennai - 104.

2.The Deputy Commissioner (CT),
The State of Tamil Nadu,
Chennai South Division,
Chennai - 6.

3.Tvl.Asiatic Oxygen Ltd.,
No.4, M.T.H.Road,
Chennai - 50.

W.P.No.25620 of 2002

VBA(CO)
CSR: 17/12/2019