

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 24.01.2019

CORAM :

**THE HONOURABLE MR.JUSTICE T.S.SIVAGNANAM
AND
THE HONOURABLE MR.JUSTICE N.SATHISH KUMAR**

Tax Case Revision Nos. 1 to 3 of 2014

M/s.Roshan Commercial Traders (P) Ltd.
No.121, Santhome High Road,
Chennai- 600028.

... Petitioner in all
Tax Case Revisions

Vs

The State of Tamilnadu rep. By
The Deputy Commercial Tax Officer,
Adyar-I Asst.Circle, Greenway Road,
Chennai-28.

... Respondent in all
Tax Case Revisions

Tax Case Revisions filed under Section 38 of the Tamil Nadu General Sales Tax Act, 1959 against the orders of the Tamil Nadu Sales Tax Appellate Tribunal (Main Bench), Chennai in T.A.Nos.273, 274 and 275 of 2007, dated 19.11.2012.

For Petitioner : M/s.C.Rekha Kumari

For Respondent : Mr.V.Haribabu
Additional Government
Pleader

COMMON ORDER

These Tax Case Revisions have been filed by the petitioner/dealer questioning the orders of the Tamil Nadu Sales Tax Appellate Tribunal (Main Bench) in T.A.Nos.273, 274 and 275 of 2007 dated 19.11.2012.

2. These Tax Case Revisions were admitted by order dated 14.08.2014 on the following substantial questions of law:

"(i) Whether the goods in question are Ayurvedic Medicine or Food supplement?

(ii) Whether the department was justified in taxing the goods as food supplement and not as Ayurvedic Medicine?

(iii) In respect of Assessment year 2001-2002, whether the rate of tax on the imported goods is to be charged at the rate of 12% in terms of Entry 67 Part D of 1st Schedule, as demanded by the department or 4% as claimed by the assessee?

(iv) In respect of Assessment Year 2002-2003 and 2003-2004, whether the rate of tax on the imported goods falling under Entry 9 of Part D and E of 11th Schedule is liable to be charged at the rate of 20% holding that the goods fall under Entry 40 Part D and E of 1st Schedule?

(v) Whether penalty is imposable in the facts and circumstances of the present case?"

3. We have heard M/s.C.Rekha Kumari, learned counsel for the petitioner and Mr.V.Haribabu, learned Additional Government Pleader for the respondent.

4. The petitioner is a private Limited Company registered on the file of the respondent under the provisions of the Tamil Nadu General Sales Tax Act, 1959. The petitioner's case is that they imported Ayurvedic Bulk Reishi Gano Powder and Gano Celium Powder from Malaysia. After which they have given on job work basis to other companies to be filled in the capsules. Initially, the job work was given to M/s.Madras Pharmaceuticals, in Chennai. After the manufacturing process, the marketing of the product was done by the petitioner from January 2002 to May 2002. Subsequently, the petitioner started purchasing the filled up capsules from M/s. DXN Herbal Manufacturing (India) Private Limited, Puducherry. Thus the petitioner became a mere trader of the said product. The petitioner collected 4% on the sale of the product as they contended that it is an Ayurvedic proprietary Medicine.

5. The dispute in the instant case is with regard to the rate of tax which was levied by Assessing Officer, whether the same was right and whether the First Appellate Authority and the Tribunal were correct in confirming the order of the Assessing Officer. The reason given by the Tribunal for treating the product as one to fall under the residuary deal or on the three grounds namely, the product is imported product, secondly, it is not an Ayurvedic medicine to food supplement and thirdly, it is not sold in medical shops but is sold by multi-level marketing.

6. The petitioner started dealing with the product as a trader after May, 2002 by purchasing the capsules from one M/s.DXN Herbal Manufacturing (India) Pvt. Ltd. The said company had approached the Hon'ble Division Bench of this Court to which one of us is a party [TSSJ] in T.C.A.Nos. 341 and 342 of 2007. The question before the Division Bench was whether the said assessee was entitled to claim deduction under Section 80(I)(B) of the Income Tax Act, 1961; whether the Assessing Officer was right in denying the claim made under Section 43 (B) of the Income Tax Act, 1961. The substantial questions were decided in favour of the assessee in the judgement reported in **[2018] 96 taxmann.com 299(Madras) [DXN Herbal Manufacturing**

(India) Private Limited Vs. Income Tax Officer, Ward(1), Puducherry. The reason we have referred said decision is in support of our stand that the product has undergone a process of manufacturing. In other words, the product which was imported is not the product, which was marketed. The Court also took into consideration the various licenses obtained by the said assessee under the various enactments which showed that the product is an Ayurvedic Proprietary Preparation. At this juncture, it would be useful to refer to certain paragraphs of the said decision to give a clear view of the factual positions. Paragraph Nos. 9 and 10 from the above judgement are extracted herein,

"9. In the instant case, the petitioner/assessee was dealing with Ayurvedic drug preparation. The Tribunal has rendered its finding that the mushroom powder can be consumed in bulk form nakedly without being put into any enclosures or by putting into the gelatine capsules. We find that there is no material, based on which, such finding was recorded by the Tribunal and to say the least, it is the personal opinion of the Tribunal. The Tribunal lost sight of a very important fact that the assessee has obtained licences from various statutory authorities namely license in Form-25-D issued by the Government of Pondicherry. Food and Drug including Siddha and Unani Drugs. The manufacturing process has to be supervised by the technical staff as in the license and the names of the drugs are (a)

Reishi Gano (RG), Capsule and (2) Ganocelium (GL), Capsule. Its packing size are 4,10,15,20,30,60,90 & 100. The license contains various conditions. There is an annexure to licence, which states the list of Ayurvedic Proprietary Preparation, which has been permitted and the composition of the capsule which is as follows:

1. Cap.REISHI GANO (RG)

Each capsule contains,

CHATRAKH: 250 mg (Ganoderma)

BHUCHATRA :20 mg (Shitake)

2. Cap.GANOCEILIUM (GL)

Each Capsule contains,

CHATRAKH: 425 mg (G.Mycelium)

BHUCHATRA: 25 mg (Shitake)

Packing Size : 4,10,20,30,60,90 & 100 capsule.

10. The petitioner's license is further renewed on 14.01.2004 and to that effect Form 26-D was issued. Similarly, such renewal was effected on 17.01.2006 as well. The Government of Pondicherry, Food and Drugs Administration, issued a Certificate of Good Manufacturing Practices (GMP) to the petitioner vide certificate dated 21.04.2004. The said certificate was consistently granted to the petitioner in the year 2006, vide certificate dated 06.06.2006. The petitioner has obtained the registration under the provisions of the Central Excise Act in Form RC dated 23.02.2004. They have also obtained a license

from the Ministry of Commerce & Industry, Government of India for foreign collaboration. The petitioner has been issued a factory licence by the Chief Inspectorate of Factories, Government of Pondicherry which states that the licence is granted to the assessee for using the said premises as a factory, and not employing more than 250 persons and the installed motive power not exceeding 354 H.P. For the purpose of manufacturing Ayurvedic medicine, and the name of the finished products is also mentioned in the licence. The petitioner has obtained the licence under the provisions of Pondicherry Village and Commune Panchayat Acts, 1973 as a manufacturing unit. The petitioner has obtained the requisite approval for energisation of the 250 KVA transformer for their manufacturing unit. The list of equipments are also appended to the said approval. The petitioner has obtained the consent under Section 21 of the Air (Prevention and Control of Pollution) Act, 1981 and Rules made thereunder for the purpose of operating their plot for manufacture of Ayurvedic drugs to the capacity of 5,00,000 capsules per day."

7. Further we examined the correctness of the stand taken by the Revenue that, what was imported is put into capsules and marketed and there is no manufacturing work. After examining the process adopted by the said assessee, we held that what has been done by the assessee

is manufacturing. The decision in the case of M/s. DXN Herbal Manufacturing (India) Pvt. Ltd. is a clear answer to the first ground on which the petitioner was non-suited that the product is an imported product.

8. The second aspect is that the tribunal holds that it is not an Ayurvedic Medicine to Food Supplement. This finding is not supported by any document, but it appears to be the view of the Tribunal. This finding is incorrect because of the various licenses obtained by the manufacturer namely M/s.DNEX Herbal Manufacturing (India) Pvt.Ltd. which was taken note of in the afore mentioned decision. Furthermore, the literature also clearly described the product as an Ayurvedic Proprietary Medicine. Therefore the tribunal could not have adopted the common parlance test. The same line of reasoning was given by the Kerala Sales-Tax Appellate Tribunal, Additional Bench, Ernakulam in T.A.No.1367 of 2003 dated 31.05.2003. The appellant in the said case was one Daehsan Trading (India) Pvt. Ltd., Ernakulam, who is none other than the person who purchased the product from the petitioner before us. The question which was decided by the tribunal was whether the items Ganocelium Capsules and Reishi Gano are Ayurvedic Proprietary Medicines, items coming under Entry 141 of the First Schedule to the Kerala Sales Tax Act. The appellant therein, the person

who purchased the product from the petitioner produced several documents in support of their claim which are in the nature of the expert opinion rendered by scientists. They being

"1. The medicinal Mushroom by R.D. Rai, National Centre Mushroom Research and Training Chambhat Solam:

2. Medicinal Mushroom by B.Balakrishnan & M.C.Nair, Department of Pathology College of Agriculture, Vellayani, Kerala.

3. Letter addressed to Vaidya Visarada Ayurveda Siromani Dr.K.S.Viswanth Sarma by Daeshan Trading T.Nagar, Chennai and reply to that letter by Dr.K.S.Viswanatha Sarma:

4. Literature about Relshi (Ganoderma Lucidum): and relevant portion of the Book Relshi Mushroom Herb of Spiritual Potency and Medical Wonder by Terry Willard, Ph.B., Research by Kenneth Jones."

9. The Kerala Sales Tax Tribunal took note of the above expert opinion, and noted that it is an Ayurvedic Proprietary Medicine and it is manufactured under Drug License and therefore will not come under Entry 141 under the Kerala Sales Tax Act of the first Schedule to be taxed at 20%. Further, the properties of Relshi Gano and Ganocelium were discussed and the factual finding was given that the product cannot be treated as a Food support.

10. The authoritative opinion of qualified scholars in Ayurveda was

accepted and the tribunal in our view, rightly held that such authoritative opinion cannot be brushed aside, as the department has no such technical knowledge to reject such material. Further more, the interpretation of the revenue, that they are food supplements and the common parlance test was also rejected. Thus, ultimately it held that the product is Ayurvedic Proprietary Medicines and direction was issued to the Assessing Authority to treat the items as Ayurvedic preparations and tax accordingly. We have informed that the order passed by the Kerala Sales Tax Tribunal has attained finality and the appellant therein, the person who purchased the product from the petitioner before us has also been granted refund. Since the product is same, the factual finding will bind the respondent department, though the decision was rendered by a tribunal in the State of Kerala. The revenue has not been able to bring down any material to dislodge the factual finding recorded by the Tribunal duly supported by expert opinion. Therefore, the second ground on which the tribunal refused the relief to the petitioner deserves to be set aside.

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11. Third and the last ground is that the product is marketed through multi level marketing and not sold in all the shops. This can hardly be a reason to determine the rate of tax payable on the product when it is sold. The manner in which the product is sold cannot be a test

to determine the nature of the product of that matter at what rate it has to be taxed. Therefore, the Tribunal misdirected itself in referring to the method of marketing as a reason for imposing a higher rate of tax. It is common knowledge that now a days all products are available through online purchaser. Therefore, the method of purchase at a stretch of imagination cannot be a reason to impose a higher rate of tax.

12. Thus, for the above reasons, the order passed by the Tribunal requires interference. Accordingly, the Tax Case Revisions are allowed and the Substantial Questions of Law are answered in favour of the appellant. No costs.

[T.S.S., J.]

[N.S.K.,J.]

24.01.2019

ssb/mrm

Index : Yes

Internet : Yes

Speaking Order / Non-Speaking order

To

Tamil Nadu Sales Tax Appellate Tribunal (Main Bench),
Chennai

**T.S.Sivagnanam, J.
and
N.Sathish Kumar, J.**

ssb/mrm



T.C.R.Nos.1 to 3 of 2014

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