

IN THE HIGH COURT OF PUNJAB AND HARYANA AT
CHANDIGARH

VATAP No.338 of 2019

Date of decision :13th March, 2020

M/s Saluja and Company

.....Appellant

Vs.

State of Haryana and others

.....Respondents

CORAM: JUSTICE S. MURALIDHAR
JUSTICE AVNEESH JHINGAN

Present:- Mr.Sandeep Goyal, Advocate, for the Appellant.

Ms.Mamta S.Talwar, DAG, Haryana.

Dr. S. MURALIDHAR, J.:

1.This appeal by the Appellant/Assessee under Section 36 of the Haryana Value Added Tax Act, 2003 ('HVAT Act') is directed against an order dated 2nd July, 2019 passed by the Haryana Tax Tribunal, Chandigarh ('Tribunal') in STA No.611 of 2018-19 for the Assessment Year ('AY') 2010-11.

2.Admit.

3.The following question of law is framed for consideration in the present appeal:

“Whether in facts and circumstances of the case, the Tribunal was justified in holding that the Mango Drink under the brand name “Slice” sold by the appellant, does not fall under Entry 100D of Schedule-C of the HVAT Act and is therefore exigible to tax @ 12.5% instead of 5%.”

4.This Court has heard the submissions of Mr. Sandeep Goyal, learned counsel for the Appellant/Assessee and Ms. Mamta S.Talwar, Deputy Advocate General, Haryana, for the Respondent.

5. The background facts are that the Appellant is a dealer registered as such under the HVAT Act as well as the Central Sales Tax Act, 1956. The Appellant is engaged in the business of trading of mineral water, aerated drinks and a mango based fruit drink 'Slice'. The Appellant is registered with the Assessing Authority, Rohtak ('AA').

6. The return filed by the Appellant for the AY 2010-11 under the HVAT Act was selected for scrutiny assessment and statutory notices in Form VAT N-2 were served on the Appellant. The assessment was finalized under Section 15 (3) of the HVAT Act by the AA by an order dated 8th November, 2013 calculating the liability of Rs.515/-.

7. The DETC-cum-Revisional Authority, Rohtak ('RA') issued a notice to the Appellant under Section 34 of the HVAT Act on the basis that the assessment order dated 8th November, 2013 suffered from the following illegality and impropriety which were prejudicial to the interest of the State:

'The Assessing Authority has assessed the tax on slice/Maaza @ 5.25% instead of @ 13.125% as the goods are unclassified under the HVAT Act'

8. By an *ex-parte* order dated 17th October 2018, the RA created an additional demand of Rs.3,59,505/- holding that the item in question i.e. 'Slice' is an instant energy giver and falls in the category of 'energy drink'. It was held that the product 'Slice' has only 17% content of Mango Pulp. 83% includes water, sugar and other artificial/natural flavours. It was therefore, treated as an unclassified item liable to be taxed at 12.5% in addition to a surcharge of 5%. It is required to be noticed at this stage that according to the Appellant, 'Slice' is fruit drink brand of 'PepsiCo' and is promoted and sold as a non-aerated fruit pulp-based drink made from mangoes, water and sugar.

9. Aggrieved by the order of RA, the Appellant appealed to the Tribunal. By the impugned order dated 2nd July, 2019, the Tribunal upheld the order of the RA to the extent of holding that the product 'Slice' was not covered under Entry 100-D of Schedule-C to the HVAT Act and that it was an unclassified item amenable to tax and surcharge @ 13.125%. As regards the levy of

interest, the Tribunal clarified that interest on additional demand created for the first time by the RA was leviable from the date of order of the RA and not for any period prior thereto.

10. The contention of the Appellant throughout has been that Slice is a fruit drink the main ingredients of which are mango, water and sugar. According to the Appellant, the mango used in its pulp form gives the drink its flavour and main essence. According to the Appellant, the product is covered under the Entry 100D of Schedule C of the HVAT Act.

11. It is submitted that when there is specific entry which covers the product, there is no occasion to resort to the entry governing 'unclassified items'. Reliance is placed on the decisions of the Supreme Court in ***HPL Chemicals Ltd. v. CCE (2006) 5 SCC 208*** and ***Dunlop India & Madras Rubber Factory Ltd. v. Union of India 1983 (13) ELT 1566 (SC)***.

12. It is submitted by the Appellant that Slice is not an energy drink. It is pointed out that, invariably, fruit based drinks have higher ratio of water and sugar. Water is used for solubility and sugar for enhancement of taste as well as increasing the shelf life. However, it is essentially a fruit drink. Reliance has also placed by the counsel for the Appellant on the following decisions: ***Edward Keventer Pvt. Ltd. v. Bharat State of Agricultural Marketing Board (2000) 6 SCC 264***; ***Parle Agro Pvt Ltd. v. Commissioner of Commercial Taxes, Trivandrum (2017) 7 SCC 540***; ***Pepsico India Holding Pvt. Ltd. v. State of Punjab (VATAP No.32 of 2009)***; ***Pachranga Syndicate Pvt. Ltd. v. State of Haryana (CWP No.6805 of 2005)***; ***Pepsico India Holding Pvt. Ltd. v. State of Assam (2009) 25 VST 41***; ***Hamdard (Wakf) Laboratories v. State of Haryana 58 PHT 162 (HTT)*** and ***S.R.Foils and Tissue Limited v. The State of Haryana 2016 SCC On Line P&H 18333***.

13. Learned Deputy Advocate General, Haryana, for the Respondents defended the impugned order of the Tribunal. According to her, only drinks

made of fruits/vegetables would be covered by Entry 100-D. In other words, the drink must predominately contain the fruit as pointed out by the Tribunal. Since the product Slice contains only 16% mango fruit, 70% water and 13% Sugar, it cannot be classified as a fruit drink. The fruit content was only 1/6th of the product. She sought to distinguish the decisions relied upon by the counsel for the Appellant.

14. The entry in question i.e. 100-D of Schedule-C to the HVAT Act reads as under:

'100D "Processed or preserved fruits and vegetables including jam, jelly, pickle, squash, juice, drink, paste and powder, made of fruits/vegetables, whether sold in a sealed container or otherwise and wet dates.'

15. The entry *per se* is wide enough to cover not just fruits and vegetables and products thereof but wide range of products which includes "juice, drink paste and powder made of fruits". A distinction has to be drawn between a 'concentrate' of fruit, which would require a very high percentage of fruit content, and a 'drink' made of such fruit. The critical aspect to be considered in examining whether a product can be classified as a 'drink' made of a 'fruit' is whether it is in fact drinkable as such. In other words, it should be in a form that can be imbibed readily as a drink. Clearly when the legislature used the word 'drink' made of 'fruit', it did not intend that the percentage of the fruit in such drink should be so high to a point of making it impossible to be drunk. It would not be possible to classify a product as a fruit drink, which is no different from the 'concentrate' of such fruit.

16.1 In *Edward Keventer Pvt. Ltd. v. Bharat State of Agricultural Marketing Board* (*supra*), the question that arose for consideration was whether the ready to serve beverages like 'Frooti' and 'Appy' fell within the description of 'mango' and 'apple' respectively, specified in the schedule to the Bihar Agricultural Produce Market Act 1960 ('BAPM Act'). In terms of the schedule to the BAPM Act, read with Section 2 (1)(a) thereof, mango and apple juices are covered under the Items Nos.1 and 13 respectively. The taxing authorities treated both the beverages as a fruit themselves and

required the Assessee to pay a fee for marketing such beverages. This was then challenged, unsuccessfully by the Assessee in the High Court. The Assessee then appealed to the Supreme Court.

16.2 The Supreme Court in its judgment first noticed the manufacturing process through which 'Frooti' and 'Appy' were produced. It observed:

"4...Frooti and Appy are fruit drinks and manufacturing process of both are cumbersome. It is alleged that one of 3 the ingredients of Frooti is mango pulp and not mango which is procured by the appellant company as raw material from outside agencies. Similarly, one of the ingredients of Appy is apple concentrate and not apple. The pulp is first, passed through a filter and stored in beverage tank. Similarly sugar in proportionate quantity is processed in the form of syrup after heating it to a certain temperature and then cooling it. Demineralised water is then added to the sugar syrup to the extent that it attains a certain 'brix' (sic brisk) content. Meanwhile in the beverage tank requisite amount of citric acid, non-alcoholic beverage base (NABB), other permitted additives, sodium citrate, vitamin C are added. Thereafter the sugar syrup and the mixture in the beverage tank are mixed in proportionate quantity. Thereafter the said mixture is passed through homogenizer and crushed at a very high pressure to disintegrate all the fibres, which are present in the beverage mixture. After homogenization, the mixture is then required to be passed through pasteurizer where it is heated to a temperature between 95 to 100 degrees centigrade for killing all the bacteria and micro organism, if there be any. Subsequently, the said mixture is passed through a cooling channel for cooling down to the room temperature and passed through pipe lines into the sterilizer of the tetrabrick aseptic packaging machine for packing the beverage in tetrabrick packs of 200ml size which requires high technical expertise.

16.3 Further, in the above context, the Supreme Court observed as under:

"It is true that 'Frooti' and 'Appy' are manufactured out of mango pulp and apple concentrate, but after the mango pulps and apple concentrate are processed and beverages are manufactured, the products become entirely different items and the fruits mango and apple lose their identity. In common parlance, these beverages are no longer known as mango and apple as fruits. In other words, after processing mango pulp and apple concentrate, although the basic character of the mango pulp and apple concentrate may be present in beverages, but the end products are not fruits i.e. mango and apple which are specified in the Schedule."

17.1 The principle on which the above interpretation was advanced was that

words have to be given a wider meaning where preceded by the words 'means' an 'includes'. In ***Parle Agro Pvt Ltd.*** (*supra*) the Assessee was a dealer of a fruit juice-based drink known as 'Appy Fizz' which was classified as fruit juice based drink under a notification issued under Section 6(1)(d) of the Kerala Value Added Tax Act, 2003 ('KVAT Act'). The Assessing Authority sought to classify it as an 'aerated branded soft drink' attracting a tax liability 20% whereas the Assessee sought to classify it as 'fruit juice based drink' having a tax liability of 12.5%. The relevant entry 71 read as under:

'71. Nonalcoholic beverages and their powders, concentrates and tablets including (I) aerated water, soda water, mineral water, water sold in sealed containers or pouches (ii) fruit juice, fruit concentrate, fruit squash, fruit syrup and fruit cordial [x x x] (v) other nonalcoholic beverages; not failing under any other entry in this List or in any of the Schedule.'

17.2 It was held by the Supreme Court that fruit juice-based drinks were never treated as 'aerated branded soft drink' when one examined carefully Section 6 (1)(a) and Section 6(1)(d) of the KVAT Act. It held as under:

“A bare perusal of Entry 71 as above indicates that the Entry covers nonalcoholic beverages and their powders, concentrates and tablets in any form including Item No.2 contains fruit juice, fruit concentrates, fruit squash, fruit syrup and pulp and fruit cordial. Soft drinks other than aerated branded soft drinks are included in Item No.3. Health drinks of all varieties are included in Item No.4 and similar other products not specifically mentioned under any other entry in this list or in any other Schedules were included in Item No.5. The Entry of fruit juice based drinks got subsumed in the residuary entry and the amendment by S.R.O. No.119 of 2008 did not change or affect the character and content of the products which were included in Entry 71.”

18. Both the aforementioned decisions in ***Edward Keventer Pvt. Ltd.*** (*supra*) and ***Parle Agro Pvt Ltd.*** (*supra*) support the proposition advanced by the Appellant in the present case that Entry 100-D of the Schedule C to the HVAT Act does not admit of a narrow interpretation particularly when it uses the words 'fruit drinks made of' the fruit in question. Even if one

applied the common parlance test, the Appellant is right in contending that Slice does not cease to be a drink made of fruit only because the actual fruit content is 16%.

19. There is of course the broad proposition that if two views are possible, the one advantageous to the Assessee should be preferred. This finds support in the decision of the Supreme Court in ***Bihar State Electricity Board v. Usha Martin Industries 1997 (5) SCC 289***, followed by the decision of this Court dated 19th February, 2014 in CWP No.6805 of 2005 (***Pachranga Syndicate Pvt. Ltd. v. State of Haryana***).

20.1 An Entry similar to Entry 100-D came up for consideration before the Gauhati High Court in ***Pepsico India Holding Pvt. Ltd. v. State of Assam (2009) 25 VST 41***. This was in the context of classifying 'Potato Chips' sold under the brand name 'Lays' and 'Uncle Chips' under the Entry 80 Part A of the Second Schedule to the Assam Value Added Tax Act, 2003 (Assam VAT Act). Entry 80A read as under:

'80. Processed or preserved vegetables and fruits including fruit jam, jelly, pickle, fruit squash, paste, fruit drink and fruit juice.'

20.2 The Gauhati High Court accepted the plea of the Assessee as under:

“it would be correct to hold that 'potato chips', though not specifically included, yet, as the same have not been excluded either, would come within the inclusive definition of 'processed vegetable or fruit' so as to fall under entry 80 of Part A of the Second Schedule to the Act. That apart, the Government of India has understood 'potato chips' to be a vegetable product for the purpose of classification under the Central Excise Tariff Act. Such understanding has also been reiterated by the Ministry of Food Processing. Therefore, “potato chips” manufactured and sold by the petitioner-company under the brand name “Lays” and “Uncle Chips” would be covered by entry 80 of Part A of the Second Schedule to the Assam Value Added Tax Act, 2003 during the relevant period.”

21. For all of the aforementioned reasons, this Court is satisfied that both the RA and Tribunal erred in holding that product in question i.e. 'Slice' is not covered under Entry 100-D of Schedule C to the HVAT Act. The impugned

orders of the RA as well as the Tribunal are accordingly set aside. The question of law framed is answered in the negative i.e. in favour of Appellant/Assessee and against the Respondent.

22.The orders of refund of any tax paid in excess by the Appellant/Assessee will be issued by the Authorities not later than four weeks from today, in accordance with law.

23.This appeal is allowed in the above terms but, in the circumstances, with no order as to costs.

**(S. MURALIDHAR)
JUDGE**

13th March, 2020

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**(AVNEESH JHINGAN)
JUDGE**

Whether speaking/reasoned = Yes/No.

Whether reportable = Yes/No.