IN THE HIGH COURT OF JUDICATURE AT MADRAS
DATED : 18.02.2022
CORAM

THE HONOURABLE MR. JUSTICE R. MAHADEVAN
and
THE HONOURABLE MR. JUSTICE J.SATHYA NARAYANA PRASAD

W.P. No. 24806 of 2007

M/s.Ram Oxygen (P) Ltd.,
131-C, Krishna Colony, Singanallur,
Coimbatore ... Petitioner

Versus

1.The Tamil Nadu Sales Tax Appellate Tribunal,
(Additional Bench), Coimbatore.

2. The Additional Appellate Assistant Commissioner (CT),
Coimbatore.

3. The Deputy Commercial Tax Officer,
Singanallur Assessment Circle,
Coimbatore. ... Respondents

Prayer :Writ Petition filed under Article 226 of the Constitution of India praying for issuance of a Writ of Certiorari, calling for the records of the 1st respondent in its proceedings in CTSA.No.191/2001 dated 12.12.2006 and quash the same.

For Petitioner : Mr.C.Subramanian
for Mr.K.J.Chandran

For Respondents : Ms.Amirtha Dinakaran
Government Advocate (Taxes)

O R D E R
(Order of the court was made by R.MAHADEVAN, J.)

Challenging the order dated 12.12.2006 passed by the Tamil Nadu Sales Tax Appellate Tribunal (Additional Bench), Coimbatore / first respondent, in CTSA No.191/2001, relating to the assessment year 1997-98, the petitioner / assessee has come up with this writ petition.

2.In the order impugned herein, the first respondent allowed the state appeal, thereby setting aside the order of the Appellate Assistant Commissioner and restoring the order of the Assessing Officer, after having held that the commodity that was sold has to be necessarily classified under item 9 of Part E of First Schedule and not under Entry 28 of Part C of First Schedule.

3.The learned counsel for the petitioner submitted that the petitioner is a manufacturer of medical oxygen, which is classified as a drug or medicine; however, the assessing officer treating the sale of 'medical oxygen' by the petitioner as sale of 'gas', levied tax at higher rate; though the order of the assessing officer was set aside and the appeal filed by the petitioner was partly allowed by the Appellate Authority, by observing that "the sale of oxygen gas falls under item 28 of Part C of First Schedule in the category of medicine", the Tribunal erred in reversing the said finding of the Appellate Authority and restoring the order of the assessing officer. According to the learned counsel, the issue involved herein has already been settled in favour of the petitioner / assessee, in the decision rendered by a Division Bench of this Court in State of Tamil Nadu v. Ram Oxygen (Pvt) Ltd and another [(2010) 35 VST 478 (Mad)] in respect of the petitioner's own case relating to the assessment years 1991-92, 1992-93, 1994-95 and 1995-96, the relevant passage of which is usefully extracted below:

> "....The definition of "drug" under the Drugs and Cosmetics Act in the year 1991 and Entry 95 of Schedule I, Part I is concerned, it specifically states that in order to ascertain the drug one should be guided by the definition of "drug" as it is defined in the Drugs and Cosmetics Act, 1940. ....
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> 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 resorted 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 Honourable 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 its 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.

Having regard to 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 Honourable 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 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 v. State of Kerala (2005) 139 STC. 504 as the provisions are 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.”

Following the aforesaid decision, a Co-ordinate Bench of this court by order dated 28.02.2019, has allowed the writ petition in WP.No.20059 of 2008 filed by the very same petitioner, by setting aside the order of the Tribunal.

4.The learned counsel for the petitioner further submitted that after referring to the decisions of the various High Courts, the Hon'ble Supreme Court, in the judgment dated 13th April 2020 passed in Civil Appeal No.2230 of 2020 SLP(C)No.19208 of 2016 etc. batch, in State of Andhra Pradesh v. M/s.Linde India Ltd, has categorically held as follows:

> "31.In the proceedings before this Court, it was not seriously disputed that Medical Oxygen IP and Nitrous Oxide IP sub-serve a medicinal purpose. There is no doubt that Medical Oxygen IP and Nitrous Oxide IP are medicines used for or in the diagnosis, treatment, mitigation or prevention of any disease or disorder in human beings falling within the ambit of Section 3(b)(i) of the 1940 Act. We hold that Medical Oxygen IP and Nitrous Oxide IP fall within the ambit of Section 3(b)(i) of the 1940 Act and are consequently covered in Entry 88 of the 2005 Act.
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> 32.The impugned judgment of the High Court to the extent it held that Medical Oxygen IP and Nitrous Oxide IP fall within Entry 88 of the 2005 Act is upheld."

5.The aforesaid submissions made on the side of the petitioner have been fairly conceded by the learned Government Advocate (Taxes) appearing for the respondents.

6.Having regard to the facts and circumstances of the case and taking note of the submissions made by the learned counsel on either side and also following the aforesaid decisions of this court as well as the Hon'ble Supreme Court, this writ petition stands allowed by setting aside the order of the Tribunal. No costs.

Sd/-
Assistant Registrar(CS-II)

//True Copy//

Sub Assistant Registrar

kas/gba

To

1.The Tamil Nadu Sales Tax Appellate Tribunal,
(Additional Bench), Coimbatore.

2. The Additional Appellate Assistant Commissioner (CT),
Coimbatore.

3. The Deputy Commercial Tax Officer,
Singanallur Assessment Circle,
Coimbatore.

+1cc to Mr.B.Raveendran, Advocate SR.No.10861
+1cc to the Special Government Pleader(Taxes) SR.No.11254

W.P No. 24806 of 2007

GPL(CO)
GN(17/03/2022)