2-16

BEFORE DELHI VALUE ADDED TAX, APPELLATE TRIBUNAL DELHI
Sh. Narinder Kumar, Member (Judicial) & Sh. Rakesh Bali, Member (Administrative)

Appeal No. 1109-1110/ATVAT/13
Date of Judgment : April 11, 2022

M/s. Hamdard Dawakhana (WAKF),
2A/3, Hamdard Building,
Asaf Ali Road, Delhi. ..... Appellant

v.

Commissioner of Trade & Taxes, Delhi. ..... Respondent

Counsel representing the Appellant : Sh. Sudhir Sangal.
Counsel representing the Revenue : Sh. Pradeep Tara.

Appeal No. 690-691/ATVAT/2013
Date of Judgment : April 11, 2022

M/s. Hamdard Dawakhana (WAKF),
2A/3, Hamdard Building,
Asaf Ali Road, Delhi. ..... Appellant

v.

Commissioner of Trade & Taxes, Delhi. ..... Respondent

Counsel representing the Appellant : Sh. Sudhir Sangal.
Counsel representing the Revenue : Sh. S.B. Jain.

11/4/22 11/4/22

JUDGEMENT

1. This judgment is to dispose of four appeals captioned above, bearing No. 1109 -1110of 2013 and 690 - 691 of 2013 as same involve common questions of fact and law, and can be adjudicated together.

2. Dealer - appellant is a Pvt. Ltd. Company, which stands registered with the Department of Trade and Taxes under Delhi Value Added Tax Act, 2004 (herein after referred as DVAT) vide TIN No. 07430012506, in Ward - 203.

3. The dealer company has challenged orders dated 12/8/2013 & 17/10/2013 passed by Learned Objection Hearing Authority-Special Commissioner -I (hereinafter referred to as Ld. OHA).

4. Matter pertains to tax period 2009-10 and 2010-11.

Appeals No.1109-1110 as regards Assessment year 2009-10.

5. Vide impugned order dated 17/10/2013 Ld. OHA has upheld the notices of default assessments of tax and interest u/s 32& 33 read with S. 86(12) of DVAT Act.

6. Notices of default assessment of tax and interest & penalty dated 21/2/2013 came to be issued **by the Assessing Authority**, whereby he directed the dealer company to pay tax to the tune of Rs. 2,06,49,731/- with interest to the tune of Rs. 87,32,290/-, and

also levied penalty of Rs. 3,05,61,601/-u/s 86 (12) of DVAT Act, for the following reasons-

"The dealer has produced the DVAT-3-/31, form-04, form-07, details of tax deposited, CA Certificate for export, DVAT-51, POA, sale summary. The dealer has made stock transfer against F-forms of Rs. 92756711/- and submitted F-form of Rs. 92756711/-. The balance missing F-forms is nil. The dealer has made sale against H-forms of Rs. 10582883/- and submitted H-forms of Rs. 10563743/- supported by export invoice, bill of leading etc. the balance missing H-forms of Rs. 19140/-.

The commodity sold on H-forms is Roohafza which is taxed @ 12.5% with interest being unspecified item under the DVAT Act 2004.

The dealer has submitted H-forms of Rs. 204827/- at the time of assessment. The credit is allowed for the F & H forms submitted by the dealer. The dealer has Audit Para of AGCR for non submission of H and F forms. The dealer has submitted the F-forms & H-form at the time of assessment which were pending at the AGCR Audit. Balance sheet and returns filed by the dealer in time.

The dealer has made total local sale of Roohafza of Rs. 249282647/- during the assessment year 2009-10. The dealer has made sale of Roohafza of Rs. 195353117/- @ 4% and of Rs. 53929530/- @ 5% for the year 2009-10.

The commodity is not specified in schedule III. Hence, the commodity Roohafza being unspecified item is taxed @ 12.5% with interest. However, the benefit of VAT @ 4% & @ 5% is allowed as the same has been deposited by the dealer on local sale. Therefore, the dealer is liable to pay different VAT@ 8.5% & @ 7.5%. Resultant tax deficiency attracts interest @ 15% p.a. also penalty 86(12) of the DVAT Act, 2004is imposed".

7. Feeling dissatisfied with the notices of default assessment of tax, interest and penalty, objections were filed by the dealer company on ~~15/1/2014~~ 22/04/2013.

8. Vide impugned order dated 17/10/2013, Ld. OHA upheld the notice of default assessment framed by VATO, while observing in the manner as :-

"The assessments were assailed on the ground that while framing the assessment the learned Assessing Authority levied tax @ 12.5% on sale of Roohafza as against @ 4% and 5% charged and deposited by the Wakf, the commodity Roohafza being not specified in schedule III of DVAT Act, 2004.

The counsel was informed that as the same issue is already settled by OHA for 2010-11 and the order is reportedly under appeal with Hon'ble ATVAT, therefore the present objections are also decided on the same logic. The item will be considered taxable as residuary item @ 12.5%. The assessment and penalty orders are upheld".

Hence, appeal No.1109 as regards levy of tax and interest; and

appeal No.1110 as regards levy of penalty.

Appeals No.690-91 of 2013 as regards Assessment year 2010-11.

9. Appeal No 690 / 2013 pertains to notice of default assessment of tax and interest u/s 32 of DVAT Act, which came to be issued by the Assessing Authority. Vide this notice dated 25/4/2012, as regards tax period 2010-2011, the Assessing Authority directed the dealer company to pay tax to the tune of Rs. 1,97,53,577/- with interest to the tune of Rs. 59,26,073/-,for the following reasons -

> "The dealer has made the sale of Sharbat 'Roohafza' of Rs. 24,83,33,106/- @ 5% during the year 2010-11. There is no entry in schedule III under the name of 'sharbat'. Hence, the commodity Sharbat of 'Roohafza' being unspecified item is taxed @ 12.5%. However, the benefit of VAT @ 5% is allowed. Therefore the dealer is liable to pay differential VAT @ 7.5% which comes to Rs. 1,86,24,982/-. Resultant tax deficiency attracts interest @ 15% p.a.
>
> The dealer has also made the **sale** of Rs. 2,10,94,280/- **against H forms** for which no export order has been produced from the foreign buyer. The advocate Sh. Sudhir Sangal appeared on 29/11/2011 on behalf of the dealer and further stated that the export order with foreign buyer cannot be produced as we are claiming deemed export against H-form. The justification given by the dealer for non production of export order from the foreign buyer is considered and

the same is rejected. The sale is covered under section 5(3) of CST Act, 1956.

The sale against form H is rejected and the sale of Rs. 2,10,94,280/- is treated as local sale and taxed @ 5% which comes to Rs. 10,54,714/- resultant tax deficiency attracts interest @ 15% p.a.

The dealer has made **scrap sale** of Rs/. 2,08,881/- and paid tax of Rs. 10,444/- which is @ 5% and sale of Rs. 5,54,412/- on which Rs. 11,088/- has been paid which is @ 2%. The scrap sale for amounting to Rs. 2,08,881/- is taxed @ 12.5% after giving the benefit of VAT paid @ 5% and scrap sale for amounting to Rs. 5,54,412/- is taxed @ 12.5% after giving the benefit of VAT paid @ 2%. Therefore, the dealer is liable to pay differential VAT @ 7.5% on Rs. 20,881/- and VAT @ 10.5% on Rs. 554412/-.

Total tax deficiency comes to Rs. 73879/-. Resultant tax deficiency attracts interest @ 15% p.a.

Appeal No. 691/13

10. **Appeal No. 691/13** pertains to notice of assessment of penalty vide which the Assessing Authority levied penalty of Rs. 1,02,71,860/- u/s 86 (12) of DVAT Act, for the aforesaid reasons.

11. Feeling dissatisfied with the notice of default assessment of tax, interest and the notice of penalty, objections were filed by the dealer company before learned OHA.

Impugned order by Learned OHA

12. Vide impugned order dated 12/08/2013, Ld. OHA upheld the notice of default assessment framed by VATO, while observing in the manner as :-

> "During these proceedings the counsel for objector filed detailed documentation in support of the contention that item named Sharbat RoohAfza is liable to be classified at Entry No.77 of Third Schedule of DVAT Act as fruit drink/fruit juice or processed fruit and vegetable. He has stated that reliance can be placed on provisions of Prevention of Food Adulteration Act 1954 where the item fruit products have been defined. It has been stated that as per the said classification a product having fruit juice contents of 5% and above and duly processed could classify to be considered as fruit juice or fruit drink. The Ld. Counsel also placed reliance on Fruit Products Orders 1955 enacted under section 3 of Essential Commodities Act, 1955. It has been further stated that the objector holds a license under the said enactments for the said products.
>
> It has been further stated that the Ld. A.A. had at the time of assessment, not made any verification regarding classification of this product. He has cited case law to support that the onus of proof is on the taxing authority to establish that a particular item is taxable in a particular manner.
>
> Ld. Counsel furnished various evidence to support his contention

regarding the product being covered under fruit juice/fruit drink. Objector contends that breakup of the contents of the aforesaid product show that fruit juices comprise of around 10% of the total volume of Sharbat RoohAfza as below-

Ingredient	**Volume (in 100ml)**	**Percentage**
Invert Sugar Syrup	80ml	80%
Pineapple juice	08ml	8%
Orange Juice	02ml	2%
Distillate Of Keora	3.5ml	3.5%
Distillate Of Citrus Medica	0.8ml	0.08%
Distillate Of Rose Damascena	0.6ml	0.06%
Permissible Food Colours	0.6ml	0.06%
Distilled Extract (Dhania, Gajar, Khurfa, Tarbooj, Palak, Pudina, Hara Ghia, Kasni, Munnaqua, Sandal Sufeed, Khas Hindi, Charrila, Gul Nilofar, Bagre Gaozabani)	4.5ml	4.5%
Total	100ml	100%

Sample of label provided on the bottle of Sharbat RoohAfza also indicates similar composition of the "Sharbat". To further reinforce his submissions the Ld. Counsel has provided details of procurements made for production units located at Ghaziabad (UP)

and Manesar (Haryana). Copies of production registers maintained at these two production units were also furnished to show that for each batch of production the percentage contents in respect of fruit juices (namely Pineapple and Orange Juice) is 10%. The fruit juices are in fact processed juices procured from suppliers at Kerala & Nagpur.

Ld. Counsel has also furnished certificates from various experts and users of the said product to show that the item is purchased as fruit juice and it has health benefits for the consumers. One of the affidavits is from Sh. Santosh Kumar Joshi Head (Research and Development) who is supervising the production facility at Ghaziabad. The affidavit reiterates the above information about contents of the product. Objector has cited various authorities to support his contention that this item should be treated as fruit drink/fruit juice or considered at par with the cases of other processed fruits and vegetables such as potato chips and tomato sauce.

For deciding the issue under dispute, the applicability of common parlance test was also considered. Reliance in this regard is placed upon observations of Apex Court in case of CST Vs. Suraj Rubber Industries reported as (2008) 11 VST 480 as below:

> *"In interpreting the entries of tax statues, preference should be given to the common parlance meaning over the one as defined in a directory. The commodity should be understood*

in the sense in which person dealing with it understands"

Reliance can also be placed on observations of the Apex Court laying guidelines in case of (i) Dunlop India Ltd. (2) Madras Rubber Factory Vs. UOI &Ors. (AIR 1977 SC Pg.597) wherein Para 31 it has been stated that-

> *"It is well established that in interpreting meaning of words in taxing statute the acceptation of a particular word by the trade and it's popular meaning should commend itself to authority."*

In Para 36 of the said judgment it has been observed that –

> *".....It is clear that meaning given to articles in a fiscal statute must as people in trade and commerce conversant with the subject, generally treat and understand them in usual course. But once an article is classified and put under a distinct entry, the basis and classification is not open to question.*
>
> *Technical and scientific tests offer guidance only within limits. Once the articles are in circulation and come to be described and known in common parlance we then see no difficulty for statutory classification under a particular entry."*

Further reliance can also be placed on authority of Shri Chitta

Ranjan Saha Vs. State of Tripura and others reported as (1990) 79 STC 51-

> *"Where no definition is provided in the statute for ascertaining the correct meaning of a fiscal entry, the entry should be construed as understood in common parlance or trade or commercial parlance. Such words must be understood in their popular sense. The strict or technical meaning or the dictionary meaning of the entry is not to be resorted to. The nomenclature given by the parties to the word or expression is not determinative or conclusive of the nature of the goods. This has to be determined by application of the well settled rules or principles of interpretation such as the "common parlance" rule, trade or commercial parlance" rule, "commonsense rule of interpretation" and the "user test".*

In the present situation application of common parlance test would also clearly show that the product cannot be considered as fruit juice by any category of consumers.

It is to be recalled that it has also been informed by objector that fruit juices mixed with the *Sherbat* are procured not in natural form but in processed form from other processing units.

Even the objector has projected it as a combination of fruit juice, an invigorating drink unique and different from fruit juices with

exceptional medical benefits. The consumers, therefore, certainly would not buy SherbatRoohAfza against requirement of fruit drink or fruit juice or processed fruit. The applicability of common parlance test, therefore, unmistakably supports the findings of Ld. AA.

In fact on this issue sufficient guidance is also provided by the label affixed on the bottle of the product which states that the product is *"a true refreshing delight made from unique blend of herbs and pure fruit juices"*. The product is marketed as an ideal mixture to be used for preparation of various products such as milk shake, ice-cream, pudding etc. During these proceedings the objector has also strongly pleaded on the medicinal benefits of the product which make it stand out from routine fruit juices/fruit drinks.

While the onus of proving the classification of a particular item is upon the Assessing Authority yet the Assessing Authority can rely only on the strict interpretations of wordings in the statute. Obviously the reference in relevant entry is to fruit juice or fruit drink and not for any variants in end product which includes fruit juice in minor quantity.

The documentations submitted have also been carefully considered, it is quite obvious that despite of the affidavits and certifications furnished by the Ld. Counsel, the concoction known as *Sharbat RoohAfza* is sometime quite different from fruit juice and has only certain contents of fruit extract which are not the predominant

content of the said concoction.

Only by addition of fruit juices any mixture does not automatically transform into category of fruit drinks and fruit juices. Such drinks are of entirely different category and are marketed with specific reference of the fruit which forms the basic contents of the drink. In case of *Sharbat RoohAfza*no such conclusive evidence could be furnished. Further certification of evidence by a handful of users does not provide support to the case of objector.

In conclusion, it can be stated that the technical evidence furnished and the individual certification brought on record does not establish the product as liable to be covered as fruit drink or fruit juice or processed fruit and vegetable under entry no.77 of the Third Schedule to the DVAT Act. The test of common parlance also gives the same conclusion. The reliance on entries contained in other cited legislations would also be not admissible in favour of objector. The Counsel for objector has also argued that whenever two views are possible in the matter of classification the benefit should go to the dealer. However in view of above clear findings it is clear that there is no other view in classification except that the "*Sharbat*" is a unique product not having remotest affinity to any of the entries in the relevant classification. The findings of Ld. AA are upheld on this issue.

(Exports against H Forms)

The second issue pertains to rejection of claims of exports against H

forms due to failure of the dealer to furnish the purchase orders. On this issue the contention of the objector is that the dealer has all the necessary documents in support of the transactions except the purchase orders. It has been stated that furnishing of purchase orders is not mandatory under law and as matter of trade practice the purchase orders are not disclosed to the manufacturers by the Indian agents who under take exports, due to apprehension of loss of business. It has been stated that the objector has in his possession the Bill of lading, Bank advise and insurance documents to support the transactions. The Ld. AA should examine the same and thereafter decide the authenticity of claim. The contention of the objector on this issue has not been found to be acceptable and it is also noted that Ld. AA can give benefit only against irrefutable evidence of sale. Concealment of details as resorted to by the objector bound to create doubts against genuineness of the transactions. Benefit can be given only if declarations give complete particulars. However since substantial amount of turnover is involved therefore, it would be fair that a further verification of documents furnished by the dealer is made in order to see whether basic ingredients of transaction u/s 5(3) of the CST Act are satisfied. Ld. AA may undertake the exercise and reframe the assessments. The objector has informed that the dealer had furnished H forms for Rs.2,06,56,787/- before the Ld. AA at the assessment stage and subsequently two more forms of the total value of Rs.3,20,013/- have been received. Objector has sought benefit in respect of the transactions against the above declarations. These transactions may be examined for admissibility as per law. However, it is also directed that dealer would pay tax against transactions

which has been admitted to be still not covered with H forms.

(Sale of scrap)

On the next issue of levy of tax on sale of scrap the contention of objector that packing material being taxable @5% the scrap thereof are also to be sold at the same rate is not acceptable and not supported by any law. The originally purchased item and the residuary or left out scrap are two different items and cannot be treated at par in the matter of classification. The demand raised @12.5% against sale of scrap in thus fair and reasonable.

Interest

Regarding levy of interest it is clear that the liability arises as soon as there is default in payment of tax. The assessing authority has not been given the liberty to forego such claims on humanitarian grounds. The dealer would therefore be liable to pay interest from the date of liability after reframing of the assessment.

Penalty

The levy of penalty is also consequential to default and orders be modified accordingly after reframing of the assessments. There is no evidence that there are any mitigating factors to support the dealer on this issue. The scheme of DVAT Act is such that the penalty comes into picture automatically in case of default. Issue of violation of Principles of Natural Justice and desirability of offering opportunity of hearing as per scheme of DVAT Act has been discussed in detail by Hon'ble High Court of Delhi in W.P.(C) No.

4236/2012 wherein it has been observed that –

> *"Principles of Natural Justice cannot be deemed to be violated simply for the reason that opportunity for hearing was not afforded to the dealer. Such provisions are attracted only if there is a definite evidence to show that a gross injustice has been done".*

The Hon'ble Court has relied upon the case of Ajit Kumar Nag Vs. General Manager (PJ), Indian Oil Corporation Ltd., Haldia (2005) 7 SCC 764 it was held that-

> *".....the principles of natural justice are not rigid or immutable and hence they cannot be imprisoned in a straitjacket they must yield to and change with exigencies of situations they must be confined within their limits and cannot be allowed to run wild ....."*

The Hon'ble Court also observed that in Haryana Financial Corporation Vs. Kailash Chandra Ahuja (2008) 9 SCC 31, the test of prejudice was applied and it was held that if there is no prejudice, an action cannot be set aside merely on the ground that no hearing was afforded before taking a decision by the authority.

The objector has also sought relief against imposition of penalty on the grounds that in this case there was pendency of dispute regarding classification of the product. In this context it may be pointed out

that the dispute is arising out of dealer's inability to understand the provisions of the DVAT Act. In the relevant legislation the classification entries are very clear and there was no scope for misunderstanding or ambiguity. Hence the benefit of this logic is also not available to the objector. On these grounds imposition of penalty is therefore upheld.

The quantum would have to be recalculated on reframing of assessment."

13. Hence these appeals.

14. Arguments heard. File perused.

15. As noticed above, the notices of default assessment of tax and interest u/s. 32 of DVAT Act came to be issued by the Assessing Authority while observing that sharbat 'RoohAfza', the product of the dealer –appellant is not specified in Schedule-III and that the same being unspecified item, is exigible to tax @ 12.5% with interest.

16. Ld. Counsel for the appellant has contended that the assessing authority did not give any reason as to why the said commodity does not fall in Schedule - III.

As per the assessment framed by the Assessing Authority vide order dated 25/4/2012 Assessing Authority did not give any reason for the observation that the said product is an unspecified item, except that there is no entry in schedule-III, under the name

of 'Sharbat'.

As noticed above, the dealer-appellant filed objections against notices of default assessment u/s 32 and 33 of the Act. During objections, the dealer-objector was represented by an advocate and opportunity of being heard was admittedly granted to the dealer-appellant as regards the said assessment. In view of this fact, attention of the Ld. Counsel for the appellant has been drawn to the impugned order passed by Ld. OHA, after having been provided an opportunity of having been heard, Ld. Counsel for the appellant admitted that Ld. OHA has provided reasonable opportunity of being heard, and also given reasons while passing impugned order dated 12/08/2013.

The fact remains that reasons have been given in the said order dated 12/08/13 after a reasonable opportunity was granted to the dealer-appellant to put-forth its case by way of objections.

Classification of the product

17. Ld. Counsel for the appellant has submitted that the commodity 'Sharbat Roof Afza' manufactured and sold by the dealer-appellant falls in entry at Sl. No. 77 of Sch.III, and that the Ld. OHA has wrongly held that the said commodity is a unique product not having the remoteness affinity to any of the entries in the relevant classification, and thereby wrongly upheld the

assessment made by the Assessing Authority.

In support of his submission, Learned Counsel has relied on following decisions:-

i. Nestle India Ltd. Vs. State of Uttrakhand&Ors. (20-10) 31 VST 404.

ii. PepsicoInida Holdings Vs. State of Assam (2009) 25 VST 41.

iii. Mamta Surgical Cotton Industries Vs. Astt. Commissioner (Anti Evasion) Bhilwara, Rajasthan (2014) 68 VST 498 (SC)

iv. Shriya Enterprises Vs. Commissioner Commercial Tax, Uttrakhand (2012) 41 VST 413.

v. M/s Himani Ltd. Vs. Commissioner Commercial taxes (2010) 36 VST 173/174 (ALL).

vi. Commissioner of Central Excise Vs. Sharma Chemical (2003)132 STC 251.

vii. Hindustan Poles Corpn Vs. Commissioner of Central Excise (2006)145 STC 625.

Another point raised by learned counsel for the appellant is that word 'including' appearing in entry 77 of Schedule III of DVAT Act makes the definition enumerative and not exhaustive. In this regard, learned counsel has relied on following decisions:

i. Ponds India Ltd. (Merged with HL Ltd.) Vs. Commissioner of Trade Tax (Lucknow) 2008 15 VST 256 (SC).

ii. Shriya Enterprises Vs. Commissioner Commercial Taxes Uttrakhand (2012)51 VST 413 (Uttara).

iii. Mamta Surgical Cotton Industries Vs. Asstt. Commissioner (Anti Evasion) Bhilwara, Rajasthan (2104) 68 VST 498 (SC).

iv. Kemrock Industries & Exports Ltd. Vs. Commissioner Central Excise, Vadodara (2007) 210 ELT 497 SC.

On the point of interpretation of Taxing Statutes, learned counsel for the appellant has relied on decision in **Ponds India Ltd. (Merged) v. Commissioner of Trade Tax (Lucknow)** 2008 15 VST 256 (SC)

Common parlance theory

One of the contentions raised on behalf of the dealer is that class of goods have to be construed in the sense in which they are popularly understood by those who deal in them, and as such the product of the appellant is a "fruit drink" covered by entry No.77. On this point, learned counsel has referred to following decisions:

i. Commissioner of Sales Tax Vs. S N Brothers – (1973) 31 STC 302(SC).

ii. Commissioner of Sales Tax, Madhya Pradesh Indore Vs. Jaswant Singh Charan Singh (1967) 1 STC 469 (SC)

iii. Shri Chitta Ranjan Saha Vs. State of Tripura and others (1990) 79 STC51 (Gau).

iv. Dunlop India Ltd. and others Vs. Union of India AIR 1977 (SC) 597.

v. Puma Ayurvedic Herbal P Ltd. Vs. Commissioner Central Excise, Nagpur (2006) 145 STC 200.

vi. Cadbury India Ltd. Vs. Asstt. Commissioner (CT) Fast Track Assessment Circle IV, Chennai and another (2012) 51 VST 130 (mad).

vii. M/s Shalimar Chemical Works Ltd. Vs. State of Assam & Others (2012) 50 VST 253 (Gau).

viii. Ramavatar Budhaiprasad Vs. The Asstt. Sales Tax Officer, Akola and another (1961) 12 STC 286.

ix. Commissioner of Sales Tax, Madhya Pradesh, Indore Vs. Jaswant Singh Charan Singh (1967) 19 STC 469.

x. State of Punjab and another Vs. Federal Gogul Goetze (India) Ltd.(2011) 43 VST 100.

Discussion

18. In Himani Limited case (supra), Hon'ble High Court observed that the evidence led by the dealer-petitioner therein actually proved that they satisfied the twin test laid down for classification of goods.

In para 30 of the judgment, Hon'ble High Court observed in the manner as :-

"In order to determine whether a product is an item of cosmetic or a medicament a twin test as aforesaid had always found favour with the courts. The Apex Court approved the application of the twin test for the first time preferably in the case of Commissioner of Central Excise v. Richardson Hindustan Ltd. (2004) 9 SCC 156 and held that the above two tests to be determinative for classifying the goods for taxation purposes.

The above ~~two~~ twin tests, at the cost of repetition are (i) common parlance test, i.e. , to see and find out how the product in common parlance is understood and accepted; and (ii) whether the ingredients used for making the product find mentioned in the authoritative text books on Ayurveda."

19. Here, in the course of arguments, Ld. Counsel for the appellant has candidly admitted that the ingredients used by dealer-appellant in making the said commodity i.e. 'Roof Afza', do not find mention in the authoritative text book, and submitted that this is a case on the basis of common parlance test the product falls in entry No.77.

Ld. Counsel for the appellant has submitted that from the ingredients it would transpire that the said commodity contains two juices, i.e. pineapple juice and orange juice, and distilled extract of tarbooj and of the other vegetables, etc. and as such, the commodity can safely be held to be a fruit drink.

Ld. Counsel has submitted that even if the percentage of

pineapple juice and orange juice in 100 ml quantity is 8% and 2%, it cannot be said that this commodity is not a 'Fruit Drink'.

20. On the other hand, Ld. Counsel for the Revenue has submitted that the commodity manufactured and sold by the dealer has not been statutorily defined and further that in common and commercial parlance, it is not a processed or preserved fruit squash, fruit juice or distilled extract. Further, his contention is that that keeping in view the percentage of sugar, which is major content and comprising of 80% of the total quantity, whereas remaining 20% contents are made from two fruit juices, distilled extract from vegetables, herbs etc., the said commodity is not covered by entry 77 of Sch.III. Learned counsel has urged that Learned OHA has rightly placed the said item in the residual item and taxed the same @ 12.5% instead of 5%.

A change in the stand of dealer, during arguments in appeals

21. It is pertinent to mention here that during arguments, Ld. Counsel for the dealer-appellant has candidly submitted that that the said commodity is not covered by item **'Fruit Juice'.** This submission reduces the field of controversy to an extent.

Is the product a "Fruit Drink", when admittedly not a fruit juice ?

22. Ld. Counsel for the appellant has submitted that the commodity of the dealer-appellant is covered by item **'Fruit drink'** available

in the entry at Sl. No. 77 of Sch.III and as such exigible to VAT @ 5% only.

23. As per case of the dealer, the product consists of following ingredients:-

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

Further, as per case of the dealer-appellant, Department of Food had issued to the dealer a licence. Learned counsel for appellant has submitted that in view the licence, the commodity of the dealer-appellant falls under the definition of 'Fruit Product' as defined u/s 2 of Fruit Products Orders.

Then reference has been made to clause A 16.5 defining the term 'Fruit Beverage and Fruit Drink', under the Prevention of Food Adulteration Rules, 1955 as under:-

> "Fruit Beverage or fruit Drink means any beverage or drink which is purported to be prepared from fruit juice and water or carbonated water, and containing sugar, dextrose, invert sugar or liquid glucose either singly or in combination and with or without:-
>
> i. Water, Peel –oil, fruit essences and flavours,
>
> ii. Citric acid, ascorbic acid,

iii. Permitted preservatives and colours.

The total soluble solids w/w in the final product shall be not less than 10 percent.

The minimum percentage of fruit juice in the final product shall be not less than 5.0 per cent w/w.

It may also contain permitted emulsifying and stabilizing agents as prescribed in rule 61-C. It may also contain fumaric acid (Food grade) certified by Bureau of Indian Standards to the extent of 0.3 per cent by weight."

Ld. Counsel for appellant has also referred to definition of word 'beverage' as available in encyclopedia. It reads as under:-

"Liquid prepared for human consumption including types made by an infusion such as tea and coffee, fruit juices and other juices extracted from plants, such carbonated drinks as ginger ale and root beer, and alcoholic beverages, including wine, made by a fermentation process, and distilled liquor, requiring both fermentation and distillation."

On the other hand, Ld. Counsel for the Revenue has submitted that even though as per definition of 'Fruit product' available in Section 2 of Fruit Product Order, 1955, expression 'Fruit product' also means 'squashes, crushes, cordials, barley water, barreled juice and ready –to-serve beverages (fruit nectars) or any other beverages containing fruit juice or fruit pulp;" but this definition

of 'Fruit Beverage or Fruit Drink available under the other enactments does not come to the aid of the dealer –appellant in this taxation matter.

We find merit in this contention of learned counsel for the Revenue, for the reason is that in entry No.77, there is no mention that for the purposes of interpretation of its contents, reference is to be made to the words defined under Section 2 of Fruit Product Order, 1955 or in the Prevention of Food Adulteration Rules, 1955.

As regards licence issued by the Food Department to the dealer, same also does not help the dealer so far as classification of the product is concerned.

In **State of Goa and Others vs. Leukoplast (India) Ltd. (and other appeals)**, (1997) 105 STC 318 (SC), wherein the case of the assessee was that it had got a license to manufacture products namely zinc oxide/adhesive plaster B.P.C. (leukoplast), surgical wound dressing (handyplast); balladona plaster B.P.C.; capsicum plaster B.P.C. and cotton crepe bandages B.P.C. (leukocrapes) under the Drugs and Cosmetics Act and its production was controlled at every stage by the Drug Control Authorities. In that case, no significance was attached to licence given to the assessee for the manufacture the said product.

Undisputedly, the primary object of taxing statues is to raise revenue and for that purpose, various products are differently classified.

The nomenclature given by the parties to the word or expression is not determinative or conclusive of the nature of the goods. This has to be determined by application of the well settled rules or principles of interpretation.

In **Orient Paper and Inds. Ltd. v. State of M.P.,** 2006 (148) STC 649 (SC), it was held that where language of statute is plain and admits to only one meaning, no question of construction of statute arises.

Learned counsel for the Revenue does not dispute that the Court cannot read anything into a statutory provision which is plain and unambiguous.

On a perusal of the contents of entry No.77 of Schedule III, of DVAT Act, and the decision in **Orient Paper and Inds. Ltd.**'s case (supra), we find that language of statute is plain and admits to only one meaning and as such no question of construction of statute arises.

Learned counsel for the appellant has referred to decision in ***M/s. Hari Om Trading Company, Village Pabhat, Zirakpur District SAS Nagar (Mohali) v. State of Punjab;*** *(VSTI 2012 : Vol.14-C-*

400), assessment was earlier framed on the basis of consolidated / composite bills comprising the price of "Sharbat Rooh Afza" as well as Medicines. The Assessing Authority had treated both the said commodities as "Sharbat Rooh Afza" and framed assessment by applying the rate of tax @ 12.5% in respect of both the commodities. When the matter came up before the Hon'ble Tribunal, split up bills were produced and on perusal same reveal that those pertained to two different commodities. Accordingly, the Hon'ble Tribunal remanded the matter to the Excise and Taxation Officer – Assessing Authority for framing of assessment afresh.

As rightly pointed out, the point of classification of "Sharbat Rooh Afza" was neither involved nor adjudicated in that case. Therefore, said decision does not come to the aid of the dealer – appellant.

Learned counsel for the appellant has relied upon decision in an earlier litigation between the dealer and Central Excise authorities, Meerut, as regards classification of same product i.e. Sharbat RoohAfza. The decision stands reported as ***Hamdard (Wakf) Laboratories v. Collector of Excise, Meerut; 1999(113) E.L.T. 20 (SC).***

11/4

11/4

APPELLATE TRIBUNAL VAT DELHI

In ***Hamdard (Wakf) Laboratories's case (supra),*** classification of the product of the dealer-appellant, namely, Sharbat Rooh Afza was involved. There the question was whether this Sharbat Rooh Afza fells within Tariff Head 2202.90, as claimed by the dealer. On the other hand, excise authorities alleged that the Sharbat Rooh Afza fell under head 21.07.

As to the contents of the relevant Tariff Headings, paras 3,4 & 5 of the said decision reads as under:-

> "3. Chapter 22 of the Tariff deals with beverages, vinegars and spirits but does not cover alcohol liquor for human consumption. Heading 22.02 deals with "natural or artificial mineral waters and aerated waters containing added sugar or other sweetening matter or flavoured; other non-alcoholic beverages, not including fruit or vegetable juices of Heading No. 20.01." (Emphasis supplied). Thereunder are specified rates of excise duty for natural or artificial mineral waters and aerated waters and then there is the sub-heading 'Other', under which, it is submitted on behalf of the appellant would fall the said sharbat.
>
> 4. Entry 21.07 falls under Chapter 21, dealing with miscellaneous edible preparations. Entry 21.07 itself deals with "edible preparations not elsewhere specified or included", and the sub-heading under which the said sharbat has been classified says, "Put up in unit containers and ordinarily

intended for sale." Reliance is placed on behalf of the excise authorities upon Note 5 of Chapter 21 and Clause (j) thereof. It says, "Heading No. 21.07, inter alia, includes preparations for lemonades or other beverages, consisting, for example, of flavoured or coloured syrups, syrup flavoured with an added concentrated extract, syrup flavoured with fruit juices and concentrated fruit juice with added ingredients."

5. Beverages, broadly speaking are liquids for drinking, other than water, which may be consumed neat or after dilution."

While dealing with the above said question, Hon'ble Apex Court set-aside the order passed by the Tribunal, by observing in the manner as :

"The Tribunal would appear to have gone wrong in concluding that the said sharbat did not fall under Entry 2202.90 because it reads "not including fruit or vegetable juices of Heading 20.01", as meaning beverages which do not contain fruit or vegetable juices. This is patently erroneous. Where the Tariff wanted to convey this intention it used the words "not containing", as in Heading 22.01, and where it intended to convey that an article should contain something it used the word "contained", as in Entry 22.02 itself. The fact that a beverage includes fruit or vegetable juice does not ipso facto exclude it from Heading 22.02. Only beverages that contain fruit or vegetable juices that fall under Heading 20.01 are excluded from Heading 22.02.

> The Tribunal would also appear to have concluded that the said sharbat was not a beverage but a preparation for the same. The fact that three table spoonfuls of the said sharbat have to be added to a glass of water to make it drinkable does not, in our view, make the said sharbat not a beverage but a preparation for a beverage. Were that so, many beverages which are classified as such, as for example, tea, coffee, orange squash and lemon squash would not be beverages. (See, for example, paragraph 5 of this Court's judgment in the case of Parle Exports P. Ltd. et seq of the Tribunal's judgment in the case of Northland Industries . It seems to us that the phrase 'preparations for lemonades or other beverages' in Clause (j) of Note 5 of Chapter 21 was intended to refer to the industrial concentrates from which aerated waters and similar drinks are mass produced and not to preparations for domestic use like the said sharbat."

24. In the above decision, as noticed above, Hon'ble Apex Court observed that beverages, broadly speaking are liquids for drinking, which may be consumed neat or after dilution. Therein, decision of the Tribunal was that the said product was only a preparation. Hon'ble Apex Court held that the product fell within the terms of Heading 2201.90.

It is true that in entry No.77 of Schedule IIIrd of DVAT Act, word "beverage" does not find mention. Here, word "fruit drink" finds specific mention.

In this regard, it is significant to refer to the observations by Hon'ble Court that simply because 3 table spoonfuls of said sharbat are to be added to a glass of water to make it drinkable, it cannot be said that the product is not a beverage. In other words, while interpreting the entry, the aspect taken into consideration was whether the product was covered by the expression "non-alcoholic beverages, not including fruit or vegetable juices of Heading No.20/01", and not the aspect if the drink is or is not ready for drinking".

It is significant to note that contents of Heading 20.01 of Central Excise were also subject matter of interpretation in the said decision relating to the same product of the appellant, but we do not have the advantage of complete contents of Heading 20.01 having not been reproduced in the said decision. Complete text of Heading 20.01 has also not been provided to us.

Since Hon'ble Apex Court observed that the fact that a beverage includes fruit or vegetable juice does not ipso facto exclude it from Heading 22.02, sharbat was held to be a beverage while setting aside the findings of the Tribunal that it was only a preparation for the same.

11/4

11/4

APPELLATE TRIBUNAL VAT DELHI

While deciding the dispute in the above said matter, Hon'ble Apex Court took into consideration all the ingredients of the product of the dealer.

It is true that text or the contents of the Headings, discussed by the Hon'ble Apex Court, was as regards levy of excise duty, but the product being the same in both the cases, observations made by the Hon'ble Apex Court can safely be relied upon in this matter.

In view of the decision by Hon'ble Apex Court, none of the other tests laid down in the decisions relied upon by the learned counsel is applicable to the present case.

In view of the decision by Hon'ble Apex Court that beverages are liquids for drinking, consumable neat or after dilution, and that the product of the appellant-petitioner has been held to be a beverage, coupled with the words used in entry No.77 of 3rd Schedule of DVAT Act, 2004, like processed or preserved fruits including fruit drink, whether sealed container or otherwise, it can safely be said that the product of the dealer is a beverage, in the form of fruit drink, even if water is required to be added to it before its consumption.

Consequently, the product of the dealer-appellant, namely, "Sharbat RoohAfza" is held to be covered by entry No.77 of Schedule IIIrd of DVAT Act.

Present litigation pertains to tax period 2009-2010 and 2010-11. Decision by Hon'ble Apex Court as to the classification of said product is of the year 1999.We are surprised as to why the dealer was not advised to bring the decision to the notice of the department or before the OHA.

Burden always on Revenue in fiscal statute to prove that a particular product falls within a particular entry:-

25. It is true that in the decisions referred to above, and cited by the Learned counsel for the dealer, it was held that onus or burden to show that the product falls within a tariff item is always on the Revenue, but Section 78 of DVAT Act provides that the burden of proving any matter in issue, in proceedings under section 74 of this Act, or before the Appellate Tribunal which relates to the liability to pay tax or any other amount under this Act, shall lie on the person alleged to be liable to pay the amount.

In view of this provision, the burden of proof lies on the dealer-appellant, and it cannot be said that burden lies on the department, to prove that the product of the dealer-appellant was an unspecified item.

11/4

APPELLATE TRIBUNAL VAT DELHI

11/4

View once taken by the Department not to be changed subsequently:-

26. As noticed above, case of the dealer-appellant is that when the Revenue was accepting tax on the products i.e. Sharbat Rooh Afza @ 4% up to 21/01/2010 and thereafter @5% w.e.f 13/01/2010, but for the first time vide assessment dated 25/04/2012, the Department made assessment in respect of tax period 2010-11 @12.5% , while observing that the said product is an unspecified item, and there is no entry in Schedule 3rd in respect of this product. In other words, according to the dealer-appellant, department was taking a particular view up to the year 2008-09.

In **Mauri Yeast India P. Ltd. v. Stte of UP and another (2008) 14 VST 259 (SC)**, Hon'ble Apex Court observed that the classification adverted to by the assessee had been accepted by the department for a long time and as such the onus would be on the department to show as to why a different interpretation should be resorted to particularly without any change in the statutory provision.

Similarly, in **Ponds India Ltd. case** (supra), Hon'ble Apex Court observed that ordinarily it would not be permissible for the Revenue to depart there-from the interpretation, if an entry has

been interpreted by the department consistently in a particular manner for several assessment years, unless there is a material change.

Here, the department has not given any reason as to why it departed from the previous view and acceptance of assessments for several years and never earlier treated the sharbat under residuary entry. This is also not a case of change of view on account of any change or amendment in the law or the entry.

Therefore, the above two decisions fully apply to the present case of the dealer.

Conclusion

27. In view of the above findings as to the classification of the product of the dealer and that the product of the dealer does not fall in residuary entry, the resultant disputed demand of tax raised by placing the product in residuary entry deserves to be set aside. We order accordingly.

Interest

28. The contention raised by learned counsel for the dealer – appellant is that since the tax due as per returns filed was deposited, no interest should have been levied by the Assessing Authority or upheld by the learned Spl. Commissioner.

29. Once the disputed demand of tax has been set aside, the resultant demand of interest also deserves to be set aside.

Claim of exports against H-forms.

30. While making assessment dated 21/2/2013, the Assessing Authority observed that the dealer had made sale against H-forms of Rs. 1,05,82,883/- and submitted H-forms of Rs. 1,05,63,743/- supported by export invoice, bill of leading, etc. and as such there were missing H-forms of the value of Rs. 19,140/-.

In this regard, suffice it to state that Learned OHA has already remanded matter to Learned Assessing Authority for fresh assessment, on production of H forms. The relevant portion of the impugned order passed in respect of tax period 2010-2011 reads as under:-

> "However, since substantial amount of turnover is involved therefore, it would be fair that a further verification of documents furnished by the dealer is made in order to see whether basic ingredients of transaction u/s 5(3) of the CST Act are satisfied. Learned AA may undertake the exercise and reframe the assessments. The objector has informed that the dealer had furnished H forms for Rs. 2,06,56,787/- before the learned AA at the assessment stage and subsequently two more forms of the total value of Rs. 3,20,013/- have been received. Objector has sought benefit in respect of the transactions against the above declarations. These transactions may be examined for admissibility as per law.

However, it is also directed that dealer would pay tax against transactions which has been admitted to be still not covered with H forms."

No argument has been advanced by learned counsel for the appellant before this Appellate Tribunal challenging the impugned order on the point of remand of the matter and fresh assessment.

Therefore, the impugned order of remand, on the point of H forms is upheld.

Assessments of Tax, Interest and Penalty, Tax period 2009-2010

31. As regards the assessments framed for the tax period 2009-2010, during hearing on objections, counsel for the dealer had informed that the same issue, i.e. classification of the product of the dealer, said to have arisen in respect of tax period 2010-2011 already stood decided by Learned OHA, but appeal filed by the dealer was pending.

As per impugned order passed by Learned OHA, while deciding objections in respect of tax period 2009-2010, said objections were disposed of by observing that "the same are also decided on the same logic. The item will be considered taxable as residuary item @ 12.5%. The assessment and penalty orders are upheld."

This goes to show that Learned OHA disposed of the objections filed against assessment of tax -interest and penalty, in respect of tax period 2009-2010 without giving any reasons.

While disposing of objections, reasons are required to be recorded. Since this is a case, where the Learned OHA opted to dismiss the objections simply saying that he was disposing of the same on the logic already given by the other Learned OHA while dealing with the objections pertaining to tax period 2010-2011, the impugned orders upholding assessment of tax, interest and penalty are held to be bad in law, for want of reasons. In this regard, we rely on the decision in **Kranti Associates (P) Ltd. vs. Masood Ahmad Khan** 2010 (9) SCC 496. Accordingly, the impugned order passed by learned OHA deserves to be set aside.

As regards the assessments framed by learned Assessing Authority, for the reasons given above, as regards the qualification of the product of the dealer, the same also deserve to be set aside.

Conclusion

32. Consequently, all four appeals are hereby allowed and the impugned orders dated 12/8/2013 and 17/10/2013 passed by Learned OHA and the default assessment of tax & interest and penalty, as regards tax period 2009-2010 and 2010-2011 are

hereby set-aside except on the point of remand as regards H-Forms as finds mentioned in the order dated 12/8/2013.

33. Copy of the order be supplied to both the parties as per rules. One copy be sent to the concerned authority. Another copy be displayed on the concerned website. Copy of this common judgment be also placed in Appeals No. 690-691/13.

Announced in open Court.

Date :11/4/2022

11/4/22

(Rakesh Bali)
Member (A)

11/4/2022

(Narinder Kumar)
Member (J)

Appeal No. 690-691/1109-1110/ATVAT/13/405259 Dated: 13/4/22

Copy to:-

(1) VATO (Ward-203)
(2) Second case file
(3) Govt. Counsel
(4) Secretary (Sales Tax Bar Association)
(5). PS to Member (J) for uploading the judgment on the portal of DVAT/GST, Delhi - through EDP branch.
(6) Dealer
(7) Guard File
(8) AC(L&J)

REGISTRAR 13/4/22