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

Appeal No. :729-733/ATVAT/2012
Date of Judgment: July 20th, 2023.

M/s. Kan Health Care,
1101-1102, 16 Vikram Tower,
Rajendra Place,
New Delhi. .....Appellant

v.

Commissioner of Trade & Taxes, Delhi

.....Respondent

Counsel representing the Appellant : Sh. Vineet Bhatia.
Counsel representing the Revenue : Sh. N. K. Gulati

JUDGMENT

1. This common judgment is to dispose of above captioned five appeals, as common questions are involved herein.

2. Earlier, the above captioned five appeals were disposed of by this Appellate Tribunal, vide common judgment dated 10/02/2022. Feeling aggrieved by the said judgment, the dealer filed VAT appeal No. 05/2022 before Hon'ble High Court.

3. Vide judgment dated 08/12/2022, Hon'ble High Court disposed of VAT Appeal No.05/2022 by observing in the manner as:

> "8. After some arguments, the learned counsel for the parties state that the matter be remanded to the learned Tribunal to consider all issues involved inthe matter including the following questions:
>
> (i). Whether the goods in question would fall within the ambit of Entry 16appearing in the Third Schedule of the Delhi Value Added Tax Act,2004?
>
> (ii). Whether the licenses issued by various regulatory authorities isrelevant for determining the classification of the goods inquestion?
>
> (iii). Whether the product in question is understood to be 'drugs' or 'medicines' by an application of the "common parlance test" or the "commercial usage test"?
>
> (iv). Whether the department has accepted the classification of these products in the assessments prior and/or the subsequent period and the impact of the same in the present proceedings?
>
> 9. In view of the above, the impugned orders are set aside. The appeals are restored before the learned Tribunal to be decided afresh including the questions stated above.
>
> 10. Parties are at liberty to file further documents in support of theircontentions before the Tribunal.
>
> 11. The appeals are disposed of in the aforesaid terms."

That is how, all these appeals stand restored to their original number.

4. Four appeals have been filed by the dealer–assessee challenging default assessment of tax and interest framed on 25.11.2011, issued u/s 32 of the DVAT Act (hereinafter referred to as DVAT Act)pertaining to all the four quarters of the year 2008-2009.

The 5th appeal has been filed challenging assessment of penalty of Rs. 51,145/-framed on 25.11.2011, u/s 33 read with Section 86(12) of DVAT Act and pertaining to 4th quarter of 2008-2009, on account of tax deficiency.

5. Objections filed by the dealer against the notices of assessment of tax and interest, as mentioned above, came to be dismissed by learned OHA – Additional Commissioner (Z-X)vide impugned order dated 26/06/2012.

Vide order dated 26/6/2012, learned OHA allowed the objections as regards imposition of other penalties, on the ground of bona-fide belief of the dealer that the products were drugs and covered by schedule-III, and as such appeal has been filed challenging only one of the penalties mentioned above.

6. Feeling aggrieved by the rejection of the objections, in the manner indicated above, dealer came up in appeals.

7. Notices of default assessment of tax and interest, in respect of all the four quarters of 2008-2009 came to be issued by the Assessing Authority–VATO by observing in the manner as :-

"During the course of audit and test check of records such as DVAT-30/31, cashbook, ledger, sale/ purchase vouchers, balance sheet for 2008-09 and other related documents obtained from the dealer, it is found that the firm is engaged in trading of **diagnostic kits and reagents laboratory and research kits and reagents and charging VAT @ 4% on local sale.**

The diagnosis kits have been examined in the light of the provisions of DVAT Act, 2004 and different schedules provided in the Act and the under mentioned team has come to the conclusion that this **products/diagnosis kits are not covered under Schedule III entry No. 16** mentioning drugs and medicines including drugs, vaccines, syringes and dressings medicated ointment produced under a drug licence, liquid parafine, of IP grade.

As the diagnosis kits are not covered under Schedule III or any other schedule of the DVAT Act, hence, it become unspecified items which attract 12.5% VAT. Therefore, the company is liable to pay 12.5%VAT/CST on all its sale of diagnosis kit instead of 4% VAT/CST as has been charged by the company.

However, on this issue regarding rate of tax on diagnosis kit the comments of M/s Kan health Care was also sought vide letter dt. 06.07.11 and 01.08.11 issued by the deptt. In response to above letters, the company vide their letter dt.08.08.11 and 21.10.2011 has quoted two case reference in connection of tax on diagnosis kit:

Judgement in the case of Merind Ltd. v State of Maharashtra on 6th May, 2004 by the bench.

Determinations sorted by M/s Johnson & Johnson Ltd. before Ms. Archana Arora, Commissioner(VAT), Delhi vide reference No.116/CDVAT/2006.

On the basis of above two reference and other references bought in the knowledge of the team of the under signed

the dealer has requested to classify their diagnosis kit under drugs and VAT @4% on it.

From the perusal of the determination of the Commissioner (VAT), it is found that the determination is for the item namely cidex, cidexopa, alea-n-sept and kyjelly and not for diagnosis kit and hence the plea of company is not accepted on this determination.

In regard to judgement by the Bench in respect of case of Merind Ltd. Vs. State of Maharashtra, the said judgement was delivered by the Hon'ble Court/Bench u/s 61 of the Bombay Sales Tax Act, 1959 and the same is not applicable under DVAT Act, 2004. Moreover, it is also not clear whether the matter was further approached/referred by the State of Maharashtra to higher Hon'ble Court i.e. High Court/Supreme Court in the said case or not.

In this regard, it may also be pointed out that the rate of tax of different items and their classifications are not same in both the state of Maharashtra and Govt. of Delhi as the rate of tax is based on state to state e.g. Some items are taxable in one state and the same is exempted in other state. Also some is taxed in one State @4% and the same item is taxed at different rates in another state.

On the basis of above, I have come to the conclusion that the diagnosis kits are not covered under Schedule III entry No. 16 and hence, the same amounting to Rs.36,31,514/-is taxed @12.5% instead of4% along with interest."

In respect of the 2nd quarter, for the above reasons, the Assessing Authority directed the dealer to pay a sum of Rs. 5,32,316/-i.e. Rs. 3,64,224 towards tax and Rs. 1,68,092/- towards interest.

In respect of the 3rd quarter, for the above reasons, the Assessing Authority directed the dealer to pay a sum of Rs. 4,80,998/- i.e. Rs. 3,37,851/- towards tax and Rs. 1,43,147/- towards interest.

In respect of the 4th quarter, for the above reasons, the Assessing Authority directed the dealer to pay a sum of Rs. 4,37,755/- i.e. Rs. 3,15,678/- towards tax and Rs. 1,22,077/- towards interest.

8. While disposing of the objections filed by the dealer u/s 74 of the DVAT Act, as regards the rate of taxability of the diagnostic kits sold by the dealer, learned OHA was of the view that the same did not substantiate the claim of the objector fully. Learned OHA disposed of the objections while observing in the manner as:

> "I agree with the assessment of the VATO (VAT Audit) that the determination of the Commissioner, Trade & Taxes in the case of M/s Johnson & Johnson Ltd. was in respect of the specific items and cannot be made generic to apply to all diagnostic kits.
>
> In the present case, the dealer has claimed that the items sold by the company are drugs. It is claimed that these are imported and sold under the Drug license issued by the Government.
>
> Mere fact that the product is being manufactured or imported under the Drug License is not enough to cover the item under Schedule III under the entry No. 16.
>
> In a taxation statute the entries regarding rate of tax are to be clearly construed in the details of the entry itself. It

is relevant to the refer to the decision of the Apex Court in the case of the **Commissioner of Income Tax vs. M/s. Shahzada N and & Sons**, AIR 1966 SC 1342, only to indicate the rule of construction that should be applied for construing taxing provision. In the said decision, the court has observed:

> "In a Taxing Act one has to look merely at what is clearly said. There is no room for any intendment. There is no equity about a tax. There is no presumption as to a tax. Nothing is to be read in, nothing is to be implied. One can only look fairly at the language used. In a case of reasonable doubt, the construction most beneficial to the subject is to be adopted. But even so, the fundamental rule of construction is the same for all statutes, whether fiscal or otherwise. The underlying principle is that the meaning and intention of a statute must be collected from the plain and unambiguous expression used therein rather than from any notions which may be entertained by the Court as to what is just or expedient."

> "In the light of judicial pronouncements and the detailed position explained above, I am of the firm opinion that the items sold by the company are not covered under Schedule III of Entry 16 of DVAT Act, 2004, and are unspecified items and accordingly chargeable at the rate of 12.5%, which has been rightly done by the assessing authority. I do not find any error in the order of the assessing authority imposing tax and interest for all the four quarters of 2008-09 and the same are upheld."

9. From the assessment of tax and interest framed by the Assessing Authority, it is found that same were framed due to following reasons:

   a. it is found that the firm is engaged in trading of diagnostic kits and reagents laboratory and research

kits and reagents and charging VAT @ 4% on local sale.

b. this products/diagnosis kits are not covered under Schedule III entry No. 16 mentioning drugs and medicines including drugs, vaccines, syringes and dressings medicated ointment produced under a drug licence, liquid parafine, of IP grade.

c. As the diagnosis kits are not covered under any other schedule of the DVAT Act, hence, it become unspecified items which attract 12.5% VAT.

10. Arguments heard. File perused.

11. As already noticed above, while remanding the matter, Hon'ble High Court has observed that this Appellate Tribunal should consider all issues involved in the matter including the four questions specified therein.

Q.(i). to Q.(iii).

12. Firstly, the following three questions, which are interconnected, are taken up together:

> (i). Whether the goods in question would fall within the ambit of Entry 16 appearing in the Third Schedule of the Delhi Value Added Tax Act, 2004?
>
> (ii).Whether the licenses issued by various regulatory authorities is relevant for determining the classification of the goods in question?
>
> (iii).Whether the product in question is understood to be 'drugs' or 'medicines' by an application of the "common parlance test" or the "commercial usage test"?"

Accordingly, I proceed to decide all the three questions.

13. Counsel for the dealer-appellant has opened arguments while submitting that the subject products are contrast media administered to patients to have clearer view.

14. Counsel has submitted that the Revenue wrongly covered the same under 'general entry of unclassified goods'; that in respect of the above said items, a valid drug license is required by each one dealing with the same; and this is a case where appellant-assessee had a valid drug license, and as such the subject products are covered by entry No.16 of Third Schedule of DVAT Act.

Counsel for the appellant has contended that learned OHA wrongly observed that the said items used for diagnosis cannot be considered as drugs. Counsel has submitted that common or commercial or trade parlance test is to be applied in such like matters to consider if any such item is or is not drug.

Reference has also been made to Entry No. 16 of Third Schedule of DVAT Act to contend that in the given situation, all the above said items being drugs used for the purpose of diagnosis are covered by the said Entry and the dealer-assessee was liable to pay tax accordingly, and not as per assessment made by the Assessing Authority or as per the impugned order, which has upheld the assessment.

15. On the other hand, case of the Revenue is that Entry No. 16 of

Third Schedule of DVAT Act does not stipulate that provisions of Drugs & Cosmetics Act 1914 are to be taken into consideration while interpreting the said entry for the purpose of levy of tax.

It may be mentioned that in the course of arguments, counsel for appellant has of his own admitted that definition of "drug" as available under Drugs and Cosmetic Act is not binding for considering if any of the subject items can or cannot be termed as a "Drug".

16. Entry No. 16, under the Third Schedule of DVAT Act with effect from 11/05/2005, being relevant needs to be reproduced for ready reference. Same reads as under:

> "Drugs & medicines including vaccines, syringes and dressings, medicated ointments produced under a drug licence, light liquid paraffin of IP grade."

17. As noticed above, case of the dealer-appellant is that the subject products are diagnostic reagents.

Revenue has not disputed this fact.

Burden of Proof

18. Counsel for appellant has contended that the burden of proof was on the taxing authorities to show that the subject products were taxable under residuary entry. In support of his contention, he has relied on decision in **Union of India and Others v. Garware Nylons Ltd. and Others**, (1996) 10 SCC 413.

19. In Garware Nylons Ltd. and Others' case (supra), Hon'ble Apex Court observed as under:

> "The burden of proof is on the taxing authorities to show that the particular case or item in question is taxable in the manner claimed by them. Mere assertion in that subject – matter, a heavy burden lay upon the Revenue to disprove the said materials by adducing proper evidence."

The above said case was as regards the matters prior to coming into force of DVAT Act. DVAT Act came into force in 2004. On the point of burden of proof, Section 78 of DVAT Act provides as under:

> "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."

20. Having regard to the provision of DVAT Act, 2004, decision in the above cited case does not come to the assistance of the appellant.

21. During pendency of the appeal on 09/05/2023, an application came to be filed on behalf of the appellant seeking permission to produce additional documents on the issue of classification of diagnostics kits. Same have been allowed to be produced on record, in view of the observations made by the Hon'ble High Court in the order passed in appeal that the party-ies shall be at liberty to file documents.

22. Referring to the decisions in the case of ***Collector of Central Excise, Shillong v. Wood Craft Products Ltd.*** – (1995) 3 SCC 454, it has been ruled that resort can be made to a residuary heading only when by liberal construction the specific Entry cannot cover the goods in question. Referring to Entry No. 90 in the said case, which covered tabulating, calculating, cash registering, indexing and data processing, etc, other than computer machines, it was held that the words did not contain words of limitation and would cover every species of cash registering machines, irrespective of their mode of operation. In the absence of any limitation or qualification as to the different kind of cash registering machines, there was no reason for such qualification and limit the Entry to a particular kind of cash registering machine. However, computers had been specifically excluded and were separately dealt with in Entry 97(a). The assessee, who was manufacturing electronic cash registers would, therefore, be covered by Entry 90 and not by the Entry relating to computers.

23. On the point of applicability of definition available in other Acts, counsel for the appellant has relied on certain decisions.

On the other hand, counsel for the Respondent has argued that definition available in other Acts cannot be utilised for the purpose of interpretation of an entry available in a fiscal statute.

24. In **Ponds India Ltd. v. Commissioner of Trade Tax, Lucknow,** 2008 (227) E.L.T. 497 (SC),the following question arose before Hon'ble Apex Court for consideration:

> "Whether petroleum jelly is a `drug' or a `cosmetic' within the meaning of the provisions of U.P. Trade Tax Act, 1948 is the question involved herein."

"As per Section 3(b) of Durgs and Cosmetics Act, "drug" includes -

> "(i) all medicines for internal or external use of human beings or animals and all substances intended to be used for or in the diagnosis, treatment, mitigation or prevention of any disease or disorder in human beings or animals, including preparations applied on human body for the purpose of repelling insects like mosquitoes;
>
> (ii) such substances (other than food) intended to affect the structure or any function of the human body or intended to be used for the destruction of vermin or insects which cause disease in human beings or animals, as may be specified from time to time by the Central Government by notification in the Official Gazette;
>
> (iii) all substances intended for use as components of a drug including empty gelatin capsules; and
>
> (iv) such devices intended for internal or external use in the diagnosis, treatment, mitigation or prevention of disease or disorder in human beings or animals, as may be specified from time to time by the Central Government by notification in the Official Gazette, after consultation with the Board."

25. Hon'ble Apex Court observed in the manner as:

> "15. Indisputably, a license has been granted to the appellant under the provisions of the Act.
> A drug as defined in Section 3(b) thereof would not only include a medicine which is used for external use of

human beings, but if used for prevention of any disease or disorder in human being, shall also come within the purview thereof. The said definition is an extensive one. It even applies to preparations applied on human body for the purpose of killing insects like mosquitoes, which per se does not have any medicinal or any value for curing any disease or disorder in human beings.

21. It is therefore, difficult to agree with Mr. Dwivedi that a medicinal preparation must be one which has the effect of curing a disease.

While interpreting an entry in a taxing statute, the Court's role would be to consider the effect thereof, upon considering the same from different angles. Different tests are laid down for interpretation of an entry in a taxing statute namely dictionary meaning, technical meaning, users point of view, popular meaning etc. It is true that the Court must bear in mind the precise purpose for which the statute has been enacted, namely, herein for the purpose of collection of tax, but the same by itself would not mean that an assessee would be made to pay tax although he is not liable therefor, or to pay higher rate of tax when is liable to pay at a lower rate.

An exemption notification may require strict construction, but where a statute merely provides for different rates of tax, application of the principles of strict construction may not be appropriate.

Whether a product would be a drug or a cosmetic sometimes poses a difficult question and, thus, answer thereto may not be easy. For the said purpose, the Court may not only be required to consider the contents thereof, but also the history of the entry, the purpose for which the product is used, the manner in which it has been dealt with under the relevant statute as also the interpretation thereof by the implementing authorities.

27. We may, however, place on record that in State of Goa and Others Vs. Leukoplast (India) Ltd. [(1997) 4 SCC 82] while considering Entry 77 of the Sales Tax Act which spoke of drugs and medicines, including all I.V. Drips to hold that Zinc Oxide Adhesive Plaster BPC (Leukoplast), Surgical Wound Dressing (Handyplast); Belladona Plaster BPC; Capsicum Plaster BPC and Cotton Crape Bandages BPC (Leukocrapes) were held to be not `medicine' or `drug'. Apart from the fact that this

Court did not take into consideration the decision in Chimanlal (supra), it was opined;

"The assessee's contention that it has got a licence to manufacture these products under the Drugs and Cosmetics Act and its production is controlled at every stage by the Drug Control Authorities does not conclude the matter. The question is how these terms are understood by people generally? For example, can a bandage be treated as a drug or a medicine? Will the position be different if the bandage is medicated? These questions cannot be decided by reference to any definition of the Drugs and Cosmetics Act or product control licence issued by the Drugs Controller. There is no definition given in the Local Sales Tax Act or in the Central Sales Tax Act of these terms. It has to be found out how these products are understood and treated in the market. In the ordinary commercial sense, are these articles considered as drugs or medicines? These are basically questions of fact."

28. The said decision, therefore, in our opinion, cannot be held to be of any assistance for determining the issue involved herein. For the purpose of finding out the definition of `drug', within the meaning of the Sales Tax Act, this reference to the statutory meaning contained in the Act would be permissible. However, if the definition contained therein does not fit in with the object and purport for which an entry had been introduced under the local Sales Tax Act, the matter would be different. It has not been suggested nor could it be that even the ordinary meaning of `medicine' cannot be read into the taxing statute while interpreting an Entry made therein.

It is interesting to note that in Leukoplast (supra), this Court itself observed;

"12. Lord Reid pointed out that in the Purchase Tax Act, "medicine" had not been defined. So it had to be understood as an ordinary word of English language. Lord Reid observed:

> "As with so many English nouns there is no clear limit to the denotation of the word medicine. All

the circumstances must be considered and there may be cases where it is extremely difficult to decide whether or not the term medicine is properly applicable. But here I think that however one approaches the matter it would be a misuse of language to call Ribena a medicine and I would therefore allow the appeal."

13. Lord Morris who delivered a dissenting judgment tried to define the term "medicine" in the following manner:

> "What then is a medicine? The learned Judge (1969) 1 WLR at p. 1527 pointed to a dictionary definition of medicine (when used in a sense other than a substance) as `the science and art concerned with the cure, alleviation, and prevention of disease, and with the restoration and preservation of health'. In line with the learned Judge I think that a fair approach is to regard a medicine as a medicament which is used to cure or to alleviate or to prevent disease or to restore health or to preserve health."

14. Lord Wilberforce, who agreed with Lord Reid, pointed out that the fact that a drug was present in something did not convert that preparation as a whole into a drug. Merely because Vitamin C was present in Ribena, it did not become a drug."

29. Mr. Dwivedi has placed strong reliance on a decision of this Court in Shree Baidyanath Ayurved Bhavan Ltd. Vs. Collector of Central Excise, Nagpur etc. [(1996) 9 SCC 402]. This Court therein applied common sense test in relation to `Dant Manjan' (Tooth powder) to hold that it is not a medicine, opining :

> "3. We have heard the learned counsel at some length. He also invited our attention to the provisions of the Drugs and Cosmetics Act, 1940, the opinion of the experts, the statements of a few consumers as well as the description given in certain Ayurvedic books and contended that the preparation would fall within the relevant entry in the exemption notification. The Tribunal rightly

points out that in interpreting statutes like the Excise Act the primary object of which is to raise revenue and for which purpose various products are differently classified, resort should not be had to the scientific and technical meaning of the terms and expressions used but to their popular meaning, that is to say the meaning attached to them by those using the product. It is for this reason that the Tribunal came to the conclusion that scientific and technical meanings would not advance the case of the appellants if the same runs counter to how the product is understood in popular parlance."

30. Tooth powder is never treated to be a medicinal preparation. It is a toiletary preparation. No evidence on record therein was produced to prove that common man who uses `dant manjan' daily to clean his teeth consider it as a medicine and not as a toilet requisite. It does not have a limited use for a limited time. The said decision, in our opinion having regard to the entry contained in the Schedule "K" appended to the Drugs and Cosmetics Rules cannot be said to have any application in the instant case.

The product, in question, however, is treated to be a "drug". For its production, a license is required. Further, it finds place in Indian Pharmacopeia; and it does not contain any perfume. A cosmetic ordinarily would contain some perfume.

44. If an entry had been interpreted consistently in a particular manner for several assessment years, ordinarily it would not be permissible for the Revenue to depart therefrom, unless there is any material change. {See Bharat Sanchar Nigam Ltd. and Another Vs. Union of India and Others [(2006) 3 SCC 1]}."

26. In **Commissioner of Sales Tax, Uttar Pradesh, Lucknow v. Allied Surgical Emporium (Agencies),** (1986) 63 STC 331, it was observed as under:

"The catguts-sutures have been treated to be "drug" under the Indian Drugs and Cosmetics Act, 1940, as already observed above and these are used in surgical treatment preventing decay and controlling haemorrhage in the process of healing wounds. It would thus fall in the category of "medicine and pharmaceutical preparations". In my opinion the catguts-sutures are remedial agents in preventing haemorrhage and assisting in healing wounds. It, therefore, cannot be treated to be a surgical apparatus or appliance and would fall in the category of medicines whether it is traditionally known or not as such.

In common parlance the persons in trade dealing with its manufacture and sale also treat it in the category of medicines. The surgeons and patients purchase it for being used in stitching the wounds and for no other purpose because in fact it cannot be utilized for any other purpose, except for stitching the wounds. It has been brought on record that a Directorate of Medical Health, Uttar Pradesh Government, have also treated catguts-sutures as medicine while placing the order with the dealer-assessee for its supply to be made for uses in the hospitals."

27. In ***Collector of Central Excise v Wockhardt Life Sciences Ltd.***, (2012) 5 SCC 585; as regards the "common parlance test" or the "commercial usage test" following observations were made:

"33. There is no fixed test for classification of a taxable commodity. This is probably the reason why the 'common parlance test' or the 'commercial usage test' are the most common (see A. Nagaraju Bros. v. State of A.P. [1994 Supp (3) SCC 122]). Whether a particular article will fall within a particular tariff heading or not has [illegible] to be decided on the basis of the tangible material or evidence to determine how such an article is understood in 'common parlance' or in 'commercial world' or in 'trade circle' or in its popular sense meaning. It is they who are concerned with it and it is the sense in which they understand it that constitutes the definitive index of the legislative intention, when the statute was enacted."

28. This Court has come across a recent decision in **Heinz India Limited v. The State of Kerela,** Civil Appeal NO(s). 6633 of 2012. Therein, Hon'ble Apex Court has observed that the Hon'ble High Court correctly inferred and found that the product, "Nycil prickly heat powder," on the plain terms of the statute, was a cosmetic, especially in view of the Explanation which particularly referred to whether the product "is medicated" or not," and irrespective of whether it is under a license issued under the Drugs Act.

29. Recently, in **Reckitt Benckiser (India) Ltd. v. CCT (SC),** 2023 Vol. (112) GSTR, page 210, Hon'ble Apex Court has decided as to the classification of item 'Dettol'. Hon'ble Court, while referring to the precedents and the relevant provisions of the Act observed in the manner as:

> "9.5 However, so far as the product Dettol is concerned, it is the case on behalf of the appellant that Dettol is an Antiseptic Liquid and therefore is classifiable as a drug/medicine under Entry 36(8)(h)(vi).
>
> The active ingredients of Dettol are Chloroxylenol IP, Terpineol BP, Alcohol Absolute IP (denatured) and it is an antiseptic having germicidal properties and it kills germs, bacteria and it prevents infection therefore it is applied on wounds, cuts, grazes, bites and stings. It is also used in hospitals for surgical use and medical use.
>
> 9.6 Thus the Dettol is used as an antiseptic liquid and is used in hospitals for surgical use,

medical use and midwifery, due to therapeutic & prophylactic properties. Therefore, the same can be said to be an item of medicament to be treated as a drug and medicine. Here also the dominant use is a relevant consideration.

9.7 In the case of **Ponds India Ltd.** (supra) this Court has held that while deciding the issue whether any particular item would be covered under relevant entry or classification, different tests viz.

-the dictionary meaning;

-technical meaning;

- user's point of view;

-popular meaning etc.

are to be applied.

In paragraphs 35 & 38 it was observed and held as under:

"35. while interpreting an entry in a taxing statute, the court's role would be to consider the effect thereof upon considering the same from different angles. Different tests are laid down for interpretation of an entry in a taxing statute, namely, dictionary meaning, technical meaning, user's point of view, popular meaning, etc."

"38. Whether a product would be a drug or a cosmetic sometimes poses a difficult question and, thus, answer thereto may not be easy. For the said purpose, **the court may not only be required to consider the contents** thereof, but also the **history of the entry**, **the purpose** for which the product is used, **the manner** in which it has been dealt with under the relevant

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statute as also the **interpretation thereof** by the implementing authorities."

9.8 Thus, as per the settled position of law while considering a particular entry the principles of classification which are fundamental to any matter relating to classification under the taxing statute are:

(a) plain meaning to be given to the taxing provision;
(b) burden to prove classification in a particular entry is always on the Revenue;
(c) any ambiguity has to be resolved in favour of the assessee and in case of a reasonable doubt, the construction most beneficial to the assessee must be adopted;
(d) specific entry would override a residuary entry; and
(e) resort to residuary entry is to be taken as a last measure, only when by liberal construction the specific entry cannot cover the goods in question.

9.9 At this stage, it is required to be noted that the Guwahati High Court and the Rajasthan High Court have held the Dettol to be a drug under the respective entries of Assam VAT Act and Rajasthan VAT Act and have rejected the submission of the Revenue that the Dettol falls under the residuary entry. It is to be noted against the decision of the Rajasthan High Court, the Revenue had preferred the SLPs before this Court which are dismissed by this Court.

9.10 In view of the above and considering the dominant use of Dettol and the active ingredients of Dettol referred to hereinabove and that the Dettol is used as an antiseptic and

is used in hospitals for surgical use, medical use and midwifery due to therapeutic & prophylactic properties the same would fall under Entry 36(8) (h) (vi) as claimed by the appellant and would not fall under the residuary entry as claimed by the Revenue. To that extent the impugned judgment and order passed by the High Court deserves to be quashed and set aside.

10. In view of the above and for the reason stated above, present appeal succeeds in part. .....So far as the impugned judgment and order passed by the High Court with respect to Dettol Antiseptic Liquid is concerned, the impugned judgment and order passed by the High Court is set aside and it is held that the product Dettol would fall under Entry 36(8) (h)(vi) of Third Schedule of the KVAT Act and shall be liable to be taxed at four percent. Present appeal is accordingly partly allowed to the aforesaid extent."

30. On the point of relevance of common parlance test, counsel for the appellant has relied on certains decisions. Same are taken up one by one.

31. In **B.P.L. Pharmaceuticals Ltd Vs Collector of Excise, Vaddodara,** 1995(77) E.L.T. 485 (SC), reliance was placed on a number of judgments to support his argument that in common and commercial parlance the product was known as medicine rather than cosmetic.

32. Hon'ble Apex Court observed in the manner as:

"As pointed out already and in support of that submission affidavits and letters from Chemists, Doctors and

customers are filed to show that the product is sold under prescription only in Chemists shops unlike shampoos sold in any shop including provision shops.

This conclusion, namely, the product is understood in the common and commercial parlance as a patent and proprietary medicine was also found by the Central Board of Excise and Customs as early as in 1981 and accepted by the Excise Authorities and in the absence of any new material on the side of the respondents there is no difficulty in accepting this contention without referring to decision cited by the counsel for the appellants."

32. Counsel for the revenue has placed reliance on decision in **State of Goa and Others vs. Leukoplast (India) Ltd. (and other appeals)**, (1997) 105 STC 318 (SC), to contend that for interpretation of the entry, provisions of Drugs & Cosmetis Act cannot be used.

Therein, 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.

Hon'ble Apex Court observed in the manner as:

"The Question is how these terms are understood by people generally? For example, can a bandage be treated as a drug or a medicine? Will the position be different if the bandage is medicated? These questions cannot be decided by reference to any definition of the Drugs and

> Cosmetics Act or product control licence issued by the Drugs Controller. There is no definition given in the local Sales Tax Act or in the Central Sales Tax Act of these terms. It has to be found out how these products are understood and treated in the market. In the ordinary commercial sense, are these articles considered as drugs or medicines? These are basically questions of fact."...."In our view, whether the products manufactured by the assessee can be treated as "drugs or medicines" cannot be answered straightway. The medicinal content of the products, if any, has to be ascertained. Its curative function has to be found out. Can the product be called a medicament at all? Is it used to cure or alleviate or to prevent disease or to restore health or to preserve health? Are these products treated as drugs or medicines in common parlance? These are basically questions of fact."

Therein, assessee-company was given liberty to prefer appeal against the assessment order in accordance with law.

In that matter, no definition was available or prescribed in the local Sales Tax Act or in the Central Sales Tax Act of these items.

33. Hon'ble Apex Court ~~has given~~ was of the view that the questions raised therein in respect of above mentioned products - subject matter of that case-could not be decided by reference to any definition of the Drugs and Cosmetics Act or product control licence issued by the Drugs Controller.

34. On behalf of the Revenue, reliance has been placed on decision in **Alpine Industries vs. Collector of Central Excise**, (2003) 3 SCC 111, wherein by majority opinion of

two against one, the Tribunal had held against the appellant that its manufactured product with trade name 'Lip Salve' was classifiable for payment of excise duty under Heading 33.04 of Central Excise Tariff Act, 1985 as 'a preparation for care of skin' and not as a 'medicament'.

Therein, Hon'ble Apex Court confirmed that the product was essentially a preparation for protection of lips and skin, and not a 'medicament'.

On behalf of respondent, reliance has also been placed on **Orient Paper and Inds. Ltd. v. State of M.P.,** 2006 (148) STC 649 (SC), to contend that where language of statute is plain and admits to only one meaning, no question of construction of statute arises.

Decision in **Dabur India Ltd. vs. Commissioner of Sales Tax And Ors.,**96 (2003) CLT 222**,** Orissa, has been relied on behalf of Revenue to point out that therein Hon'ble High Court held that "Lal Dantamanjan" is not a drug as defined in Section 3(b) of the Drugs and Cosmetic Act, 1940, and, therefore, the same was exigible to sales tax under residual item.

Therein, the question was whether sale of "Lal Dantamanjan" was to be taxed under item 37 or under Residual item 105.

Item 37 of the List of Taxable Goods reads as follows:

"37.

Drugs as defined in Clause (b) of Section 3 of the 'Drugs and Cosmetic Act, 1940, and Ayurvedic, Homoeopathic and Unani Medicines." " six percent ".

Six percent Residual item 105 reads as follows:

"105.

" "
All other goods Twelve percent".

Therein, the Assistant Commissioner of Sales Tax as well as the Commissioner observed that "Lal Dantamanjan" had not been prepared as per the prescription of the authoritative book and it was not prescribed for any specific food disease. It was in the given circumstances that the product was held exigible to Sales Tax, and further that the same was not a drug.

But the fact remains that for the purposes of interpretation, the Hon'ble Court referred to the definitions available under Drugs & Cosmetics Act, 1940.

In view of observations by Hon'ble Apex Court in Ponds India Ltd.'s case (supra), decision in **Leukoplast (India) Ltd.'s case (supra),** decision in **Dabur India Ltd. vs. Commissioner of Sales Tax And Ors.,**96 (2003) CLT 222, do not help the revenue.

35. Counsel for the respondent has referred to decision in **Dabur India Limited and Anr. vs. ACCT/Corporate Division and Ors.**, (2007) 5 VST 190 (WBTT) decided by State Taxation

Tribunal, West Bengal, to point out that therein, the petitioner-company had shown that all the ingredients in the product – Hajmola Candy, ~~found~~ stood mentioned in an authoritative ayurvedic text book and the same was mentioned in a licence issued by Drug controller , but the company had not produced any evidence if the said product was prescribed by any ayurvedic doctor, even though sold across the counters. Accordingly, the said product was not acknowledged as a medicine but as a confectionary. Here assessee has led evidence of skilled persons in the field.

36. On behalf of the Revenue, reliance has been placed on decision in **Span Diagnostics Pvt. Ltd. vs. State of Maharashtra**, (2004) 136 STC 196 (BOM).

Therein, the contention was that words "for diagnosis" were even though not mentioned in entry C-I-24, the medicinal formulations/preparations used for diagnosis be held to be covered within the meaning of medicinal formulations/preparations used in the treatment of human beings in entry C-I-24. Hon'ble High Court of Bombay did not accept this contention raised on behalf of the appellant while observing that it cannot be said that the word "treatment" means diagnosis.

Here, indisputably the products are diagnostic kits and reagents which are used for diagnosis.

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37. In **Shri Chitta Ranjan Saha v. State of Tripura**, 1990 (79) STC 51 (GAU), it was observed:

> "The principles laid down by the courts in various decisions discussed above can be summarised as follows :
>
> Where no definition is provided in the statute for ascertaining the correct meaning of a fiscal entry the same 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. The same will have to be determined by application of the well-settled rules or principles of interpretation which have been referred to as "common parlance" rule, "trade or commercial parlance" rule, "common-sense rule of interpretation" and "user test". The application of the principles will again depend on the facts and circumstances of each case. No test or tests can be said to be validly applicable to all cases. There may be cases where the interpretation may be tested by applying more than one rule of interpretation as has been done by the courts in certain cases."

Test of common parlance

38. As regards the products, to which these appeals pertain, it cannot be accepted that the common man would have knowledge about the said products. Therefore, common parlance test is not applicable to the present case.

Relevance of Determination Order dated 7/8/2006

39. On behalf of the dealer, reference has been made to a determination order passed by **Commissioner, VAT, Delhi,** in application NO. 116/CDVAT/2006, on 7/8/2006 in r/o **M/s. Johnson & Johnson Ltd.,** to support its claim that the products of the dealer are drugs and medicines, and as such exigible to tax under entry 16 of Schedule III of DVAT Act.

So far as order dated 07/08/2006 passed by learned Commissioner, VAT, Delhi while disposing of an application u/s 84 of DVAT Act, decided the following question:

> "Whether entry No. 16 and / or 92 of the Third Schedule of the Delhi Value Added Tax Act, 2004 covers products sold by the petitioner, namely, cidex, cidezyme, cidexopa, ecoshield, clea-n-sept, KY Jelly, signaloc, biosorb, cidex disinfecting tray systems (bucket, small, large tray)?"

40. Learned Commissioner, while disposing of the application, was of the considered view that the items cidex, cidexopa, clea-n-sept and KY jelly are covered by the Entry No. 16 of Schedule-III of the said Act and rest of the items are general unspecified falling u/s 4(1)(e) of DVAT Act 2004.

The determination order does not pertain to any of the products in respect whereof assessments have been made by the Assessing Authority and which have been upheld by the learned OHA in the present case, and as such, counsel for

respondent has rightly submitted that the Determination Order does not come to the aid of the dealer-appellant.

41. Counsel for the Respondent has relied on Determination Order No. 252/ CDVAT/2009/Review/89 dated 18/12/2012, in the matter of M/s Praveen Kumar Verma, wherein, the Commissioner, Department of Trade & Taxes, Delhi, observed that it is not open to the VAT Authorities to enlarge the scope of Entry No. 92 of Third Schedule by importing all provisions of Drugs and Cosmetics Act of 1940.

42. In the Determination Order i.e., in the case of M/s Praveen Kumar Verma, it was observed as under:

> "5. Since reagents and wash solutions are used in the medical devices for diagnosis of diseases and sanitising respectively and there is no specific entry to cover them, they should be interpreted in context of Entry No. 92 only. The Entry No. 92, unlike Entry No. 16, does not owe any reference to drug license and hence it should be read as such and it is not open to the VAT authorities to enlarge the scope of entry by importing the provisions of Drugs & Cosmetics Act, 1940 so as to enlarge the scope of the entry under the DVAT Act, 2004. In this context judgment of Bombay High Court in Span Diagnostics Pvt. Ltd. v. State of Maharashtra in 2004 (136 STC 196 Bom) is especially relevant where on applicant's plea that medicines be interpreted in context of Drugs & Cosmetics Act, 1940, the High Court held that since medicines are not defined under BST Act, and defining the entries is the exclusive prerogative of the State, it is not open to import the provisions of the Drugs & Cosmetics Act, 1940 so as to enlarge the scope of the entry under the BST Act. For same reason

attempt of the Counsel for the applicant to seek refuge under the definitions of 'Medical Devices' by WHO, ICSR, EU and FDA, US is not correct. A classic example is this context is that of 'Counterfeit medicines'. India has been opposing the definition of 'Counterfeit medicine' promulgated by WHO at various international forums. Hence, it would be incorrect to interpret a VAT entry by drawing from another treatise."

No doubt, in the above determination order, decision of the Hon'ble High Court to the effect that it is not open to import the provisions of the Drugs & Cosmetics Act, 1940 so as to enlarge the scope of the entry under the BST Act, was cited, in view of the well settled law cited above, definition of word "drug" as available in the Act of 1940, may be of relevance for adjudication of the present dispute, while appreciating the evidence led by the appellant, when common parlance test does not apply to these matters.

Relevance of Drugs Licence

43. Counsel for the dealer-appellant has contended that in respect of all the subject items-products the dealer-appellant was issued licence by competent authority of Drugs, which goes to show that these products are drugs.

As already noticed above, case of the dealer-appellant that the product of the dealer is known as diagnostic kit and reagents, is not being disputed by the Revenue.

Vide letter dated 22/8/2006, import license was issued to the dealer – appellant under Drugs Act, 1940 and Drugs rules

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framed thereunder, by Drugs Controller General (India). It may be mentioned here that dealer – appellant has not placed on record licence No. NCD-179/2006 dated 22/8/2006, issued by this letter.

As per contents of above letter the dealer – appellant was advised to obtain, where necessary, licenses for import of drugs in question under the import Trade Control Regulations.

As submitted on behalf of the dealer, another Drug licence was issued to the dealer – appellant under Drugs and Cosmetics Rules, 1945, w.e.f. 21/8/2009 for import of drugs into India. The diagnostic products from sl. No. 1 to 240, which were allowed to be imported by the dealer appellant, find mentioned in the list lying annexed to the said license.

Factum of issuance of this drugs licence in favour of the dealer-appellant is not being disputed by the Revenue.

Issuance of a drug licence in respect of the subject products, goes a long way to suggest that the subject products are by the competent Authority dealing with such items, considered as drugs and same are also covered by word 'drug'.

44. In support of its case, appellant has also though subsequently, produced photocopies of following documents:

(i) "Letter No.F.No.1/K-4N/2010-DC(01) dated 30th October, 2012 issued by highest security authority in

the country regulating drugs and signed by Deputy Drugs Controller of India stating that "Diagnostics Kits/Reagents are regulated as Drugs under Drugs & Cosmetics Act & Rules".

(ii) Reply under RTI received from Directorate General of Health Services on 30th November, 2012 confirming to our query that Diagnostic Kits and Reagents are classified as Drugs.

(iii) Letter from M/s. Apollo Hospitals, Chennai confirming that "They are using Diagnostic Kits to diagnose diseases in human patients and they understand such kits are treated and regulated as drugs in the industry and they, being the user, are also required to obtain drug license".

(iv) Another letter from a distributor M/s. Human Life Science, Chennai confirming that "Diagnostic Kits are used to diagnose various disease and are treated as Drugs in the industry had to store and sell these kits, valid drug license is required from state drug authority and to import, license from drugs controller is required".

(v) Determination of M/s. Johnson & Johnson issued by VAT Commissioner Delhi on 7th August, 2006.

(vi) Sample of Bill of Entry of relevant year showing importation of such diagnostic kits."

45. As per letter dated 30th October, 2012 (Page Nos. 1 & 2), issued by Central Drugs Standard Control Organisation (hereinafter referred to as CDSCO), to the appellant-dealer, in response to its application dated 07/08/2012, the dealer was informed that its case was examined in the light of documents submitted and that the said office had already issued Form 10-licence NCD-209/10 to the said dealer for the proposed diagnostics kits/reagents. CDSCO further mentioned in this

letter that the diagnostics kits/reagents are regulated as "drug" under Drugs & Cosmetics Act and Rules.

It may be mentioned here that the dealer has not placed on record copy of its application dated 07/08/2012 stated to have been submitted to CDSCO or the Annexures i.e. the documents which are stated to have been submitted to the said organization for examination and reply.

46. Appellant has placed on record copy of application dated 23/10/2012 (page no. 9) submitted to Government of India, Ministry of Health & Family Welfare, CDSCO, New Delhi, vide which following information was sought by it under Right to Information Act:

> "Confirm us that Diagnostic Kits and Diagnostics Reagents are classified as "Drugs" under The Drugs & Cosmetics Act 1940 & Rules made thereunder by the CDSCo."

It may be mentioned here that appellant has not placed on record the information provided in reply to the information sought vide the above mentioned application dated 23/10/2012.

47. Appellant has also placed on record photocopies of 2 certificates.

One certificate (page no. 10) purports to have been issued by HoD-Biochemistry, Apollo Hospitals. Same reads as under:

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> "We are using various diagnostic kits which are used to diagnose diseases in human patients and we understand that such diagnostic kits are understood and regulated as drugs and even we, as user of such kits, are required to obtain drug license from drug authorities of the country."

The other certificate (page no. 11) purports to have been issued by Authorized Signatory of Human Lifescience reads as under:

> "We are diagnostic kits distributor, storing and selling the same to the Hospitals and Laboratories. These kits are used to diagnose various diseases and are treated as drugs in the industry. As per Govt. Regulation to store and sell these kits required valid drugs license from state authority. All these kits are important from various country with license from Drug Controller."

It may be mentioned here that none of the above certificates bears date of its issuance.

48. From page Nos. 13 to 30 are photocopies of certain invoices, Bills of Entry for home consumption.

Item	Cat.- No.	Description
1.	MG59001	Calcitonin ELISA 96 Best.
2.	RE52121	FSH ELISA 96 Best.
3.	RE52181	DHEA-S ELISA 96 Best.
4.	RE52221	DHEA ELISA 96 Best.
5.	RE56111	Aspergillus fumigatus IgG ELISA 96 Best.
6.	RE56121	Aspergillus fumigatus IgM ELISA 96 Best.
7.	RE56201	Echinococcus IgG ELISA 96 Best.
8.	RE56221	Epstein-Barr-Virus EA IgG ELISA 96 Best.

9.	RE56251	Epstein-Barr-Virus EBNA-1 IgG ELISA 96 Best.
10.	RE56261	Epstein-Barr-Virus EBNA-1 IgM ELISA 96 Best.
11.	RE56281	Epstein-Barr-Virus VCA IgG ELISA 96 Best.
12.	RE56291	Epstein-Barr-Virus VCA IgM ELISA 96 Best.
13.	RE56371	Helicobacter pylori IgA ELISA 96 Best.
14.	RE56381	Helicobacter pylori IgG ELISA 96 Best.
15.	RE56611	Masernvirus (Measles) IgG ELISA 96 Best.
16.	RE56621	Masernvirus (Measles) IgM ELISA 96 Best.
17.	RE56651	Mumpsvirus (Parotitis) IgM ELISA 96 Best.
18.	RE56951	Varucekka-Zoster-Virus IgG ELISA 96 Best.
19.	RE57061	Cytomegalovirus (CMV) IgG ELISA 96 Best.
20.	RE57201	Borrelia (Lyme) IgG ELISA 96 Best.
21.	RE57211	Borrelia (Lyme) 14kD+OSPC IgM ELISA 96 Best.
22.	RE58731	Taenia solium IgG (Cysticercosis) ELISA 96 Best.
23.	DB52021	DHT Dihydrotestosterone ELISA 96 Best.
24.	DB52181	Free Testosteron ELISA 96 Best.
25.	RE52151	Testosteron ELISA 96 Best.
26.	RE52611	Cortisol Saliva ELISA96 Best.
27.	RE56371	Helicobacter pylori IgA ELISA 96 Best.
28.	RE56961	Varicella-Zoster-Virus IgM ELISA 96 Best.
29.	RE70341	Rheumafaktor-AK IgA/IgG/IgM ELISA 96 Best.

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Nature and Quantity of Goods – ENZYMIMMUNOASSAYS.

Page No. 18

Part Number	Description of Goods
RE59355	Neopterin
RE56261	Epstein-Barr-Virus EBNA- IgM
MG59001	Calcitonin

2017

S.No	Part Number	Description of Goods
1	RE52121	FSH
2	RE52181	DHEA-S
3	RE52221	DHEA
4	RE56111	Aspergillus fumigates IgG
5	RE56121	Aspergillus fumigates IgM
6	RE56201	Echinococcus IgG
7	RE56221	Epstein-Barr-Virus EA IgG
8	RE56251	Epstein-Barr-Virus EBNA-1 IgG
9	RE56261	Epstein-Barr-Virus EBNA-1 IgM
10	RE56281	Epstein-Barr-Virus VCA IgG
11	RE56291	Epstein-Barr-Virus VCA IgM
12	RE56371	Helicobacter pylori IgA
13	RE56381	Helicobacter pylori IgG
14	RE56611	Measles virus IgG
15	RE56621	Measles virus IgM
16	RE56651	Mumps / Parotitis virus IgM
17	RE56951	Varicella-Zoster-Virus IgG
18	RE57061	Cytomegalovirus IgG
19	RE57201	Borrelia IgG + VlsE
20	RE57211	Borrelia 14KD + OspC IgM
21	RE58671	Dengue IgG
22	RE58681	Dengue IgM
23	RE58731	Taenia soliumIgG(Cysticercosis)
S.No	Part Number	Description of Goods
1	RE52121	FSH
2	RE52181	DHEA-S
3	RE52221	DHEA
4	RE56111	Aspergillus fumigates IgG
5	RE56121	Aspergillus fumigates IgM
6	RE56201	Echinococcus IgG
7	RE56221	Epstein-Barr-Virus EA IgG
8	RE56251	Epstein-Barr-Virus EBNA-1 IgG
9	RE56261	Epstein-Barr-Virus EBNA-1 IgM
10	RE56281	Epstein-Barr-Virus VCA IgG
11	RE56291	Epstein-Barr-Virus VCA IgM
12	RE56371	Helicobacter pylori IgA
13	RE56381	Helicobacter pylori IgG
14	RE56611	Measles virus IgG
15	RE56621	Measles virus IgM
16	RE56651	Mumps / Parotitis virus IgM
17	RE56951	Varicella-Zoster-Virus IgG
18	RE57061	Cytomegalovirus IgG
19	RE57201	Borrelia IgG + VlsE
20	RE57211	Borrelia 14KD + OspC IgM
21	RE58671	Dengue IgG
22	RE58681	Dengue IgM
23	RE58731	Taenia soliumIgG(Cysticercosis)

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Bill of Entry for Home consumption

Description Unit Price Ass Val	
M059001	CALCITONIN

Page No. 22

Bill of Entry for Home consumption

Description Unit Price Ass Val	
RE52221	DHEA

Page No. 23

Bill of Entry for Home consumption

Description Unit Price Ass Val	
RE56201	ECHINOCOCOCS

Page No. 24

Bill of Entry for Home consumption

Description Unit Price Ass Val	
RE56261	EPSTEIN-BARR-VIRUS

Page No. 25

Bill of Entry for Home consumption

Description Unit Price Ass Val	
RE56371	HELICOBACTER PYLORI

Page No. 26

Bill of Entry for Home consumption

Description Unit Price Ass Val	
RE56621	MEASLES VIRUS

Page No. 27

Bill of Entry for Home consumption

Description Unit Price Ass Val	
RE57061	CYTOMEGALOVIRUS

Page No. 28

Bill of Entry for Home consumption

Description Unit Price Ass Val	
RE58731	TAENIA SOLIUM

Page No. 29

Bill of Entry for Home consumption

Description Unit Price Ass Val	
RE52151	TAENIA SOLIUM

Page No. 30

Bill of Entry for Home consumption

Description Unit Price Ass Val	
RE56961	VARICELLA-ZOSTER-VIRUS

49. At this stage, it would be relevant to refer to the material produced by the dealer before the department of revenue as to the classification of the products.

On the point, as to how these products are understood and treated in the market, dealer produced before the Revenue two documents before Learned OHA. One was issued on 7/2/2012 by Dr. T.D. Chugh, Sr. Consultant and Chairman, Deptt. of Microbiology, BLK Super Speciality Hospital, New Delhi – 110005, and the other issued on 8/2/2012 by Sh. Deepak Sehgal, Manager-Finance and Administration, Pragati Biomedical, 301-302, Agarwal Arcade, Plot No. 2, CU Block, Pitampura, Delhi – 88.

First mentioned document reads as under:

> "This is to confirm that the diagnostic kits supplied by Kan Healthcare are used for diagnosing various diseases."

Second mentioned document reads as under:

> "We understand & to the best of our knowledge & belief that the diagnostic kits supplied to us by M/s. KanHealthcare consist of substances, which are used by the medical profession (Medical Institutions, Hospitals & Pathology Labs) in the diagnosis of diseases like cancer, dengue, tuberculoses, etc. these diagnostic kits are categorized under drugs to help the physicians in diagnosing the diseases, as we are required to have a valid Drug License for their storage & Distribution from the State Drugs Controller.
>
> We also understand that in order to import such diagnostic kits into India, one need to have a valid drug license from The Drugs Controller of India under the Ministry of Health & Family Welfare."

In the impugned order, Learned OHA did not discuss or consider these 2 documents. Second document has not been issued by any doctor, and hence, of no avail.

The first mentioned document has been issued to confirm that the diagnostic kit supplied by the dealer – appellant were used for diagnosing various diseases.

50. It may be mentioned here that none of the said persons/institutions who issued the above documents/certificates was sought to be cross-examined by the respondent as regard their contents.

51. In Ponds India Ltd.'s case (supra), Hon'ble Apex Court observed that the assessee had filed a large number of affidavits. The deponents of the said affidavits were not been cross-examined. Accordingly, Hon'ble Court observed that

even from said point of view the application of common parlance test stood satisfied in that case.

Consequently, reliance can safely be placed on the above said documents/certificates produced by the appellant.

51. From the contents of the documents/certificates, it can safely be said that the skilled persons dealing in products including the subject products, treat the subject products as diagnostic reagents/ kits and as drugs.

Import Licence

52. It may be mentioned here that before Learned OHA, copy of import license was one of the documents submitted by the dealer. OHA observed that the main fact that the product is being manufactured or imported under drug licenses is not enough to cover the item under entry no. 16 of Schedule III.

As regards word 'Produce' which finds mention in entry no. 16 of Third Schedule, Counsel for the appellant has rightly submitted that same pertains to ointments and none of the other items, and as such this word has no relation with the words "Drugs and Medicines".

53. So, I conclude that the subject goods / products fall within the ambit of "drug" and in entry 16 of Third Schedule of DVAT Act.

Q.(iv).

Assessments of previous years – impact if any.

54. The question to be adjudicated is as to whether the department accepted the classification of the subject products in the assessments prior and/or the subsequent period and if

so, what is the impact of the acceptance of the said classification in the present proceedings?

55. Counsel for the appellant has contended that in the tax period – 2005-06 & 2006-07, the subject goods were not subjected to any tax and as such the department could not levy the subject goods to tax during the tax period – 2008-09 & 2009-10.

Learned Counsel for the Appellant has also placed reliance on decision in **Ponds India Ltd. Vs Commissioner of Trade Tax**, (2008) (227) E.L.T. 497 (SC) (Supreme Court) to submit that if an entry has been interpreted consistently in a particular manner for several years ordinarily it would not be permissible for the revenue to depart there from, unless there is any material change; that burden of proof is on the taxing authorities to show that the particular case or item in question is taxable in the manner claimed by them; and further that mere assertion in that regard is of no avail.

Counsel for the appellant has pointed out that the Revenue has been leving tax on the said three products @ 5% and as such it was for the revenue to show as to how these products were taxable under the unsatisfied entry so as to levy tax @ 12.5%.

On this point, counsel for the respondent has rightly submitted that in the assessments for the tax period 2005-06 and 2006-07, there is no mention therein that any turnover pertained to sale of any such product falling in Entry No. 16

of Third Schedule, and as such the arguments advanced by counsel for the appellant that the department has not been consistent in framing of assessments, is without any merit.

Conclusion

56. In view of the above discussion, having regard to the documentary evidence filed by the appellant, the well settled law and applying the commercial parlance test to the present case, it is held that the subject items - diagnostic reagents/ kits are drugs and as such, fall under Entry 16 of Third Schedule. Consequently, all these items are exigible to tax under the said entry, and not under the residuary entry of the said schedule.

Tax-period 4th Quarter 2008-2009 as regards levy of Tax in respect of sale of car

57. As noticed above, in the notice of default assessment of tax and interest, issued u/s 32 of DVAT Act, pertaining to the 4th quarter of 2008-2009, the Assessing Authority observed that the Dealer-Assessee-Appellant had sold capital assets worth Rs. 3,07,500/-, but not paid VAT on that. Hence, the dealer was liable to pay VAT @12.5% on sale of capital asset-car worth Rs. 3,01,000/-, and VAT @4% on capital asset -sale of telephone instrument- worth Rs. 6,500 /-.

On this point, in the course of arguments, no contention was raised by counsel for the appellant challenging the impugned order or the impugned assessment.

58. No other argument has been advanced by counsel for the parties on the above said points or on any other point which led to the framing of assessments and passing of impugned orders.

Result

59. In view of the above findings, these appeals are partly allowed and accordingly, the impugned assessments and order upholding assessments of tax, interest and penalties only as regards the issue pertaining to the subject products covered by Entry 16, Third Schedule of DVAT Act are set aside. Assessing Authority to do the needful accordingly.

60. File be consigned to the record room. Copy of the judgment 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.

Announced in open Court.

Date : 20/07/2023

Narinder Kumar 20/7/2023.

(Narinder Kumar)
Member (J)