IN THE HIGH COURT OF JUDICATURE FOR RAJASTHAN AT JAIPUR
BENCH, JAIPUR

1. **S.B. SALES TAX REVISION PETITION No.151/2005**

ASSISTANT COMMISSIONER, COMMERCIAL TAXES DEPARTMENT, CIRCLE-A, JAIPUR.

v.

M/S KHANDELWAL DRUG AGENCIES, C-5 GOVIND NARG, JAIPUR.

2. **S.B. SALES TAX REVISION PETITION No.149/2005**

ASSISTANT COMMISSIONER, CIRCLE-F, JAIPUR.

v.

M/S KHANDELWAL DRUG AGENCIES, C-5 GOVIND NARG, JAIPUR.

3. **S.B. SALES TAX REVISION PETITION No.155/2005**

ASSISTANT COMMISSIONER, COMMERCIAL TAXES, CIRCLE-A, JAIPUR.

v.

M/S KHANDELWAL DRUG AGENCIES, C-5 GOVIND NARG, JAIPUR.

4. **S.B. SALES TAX REVISION PETITION No.156/2005**

ASSISTANT COMMISSIONER, COMMERCIAL TAXES DEPARTMENT, CIRCLE-A, JAIPUR.

v.

M/S KHANDELWAL DRUG AGENCIES, C-5 GOVIND NARG, JAIPUR.

5. **S.B. SALES TAX REVISION PETITION No.158/2005**

ASSISTANT COMMISSIONER, CIRCLE-F, JAIPUR.

v.

M/S KHANDELWAL DRUG AGENCIES, C-5 GOVIND NARG, JAIPUR.

Order reserved on : 9th November 2016
Order pronounced on : 25th November 2016

HON'BLE MR. JUSTICE JAINENDRA KUMAR RANKA

Ms. Meenal Ghiya counsel for petitioner
Mr. Alkesh Sharma counsel for respondent

ORDER
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1. These petitions are directed against order dt 29.12.2004 passed by the Rajasthan Tax Board, Ajmer, where while the appeals filed by assessee were allowed, the appeals by revenue were dismissed. Since common issue is raised in the instant petitions, the same are decided by this common order.

2. Brief facts noticed are that the respondent assessee is a dealer / distributor of drugs and in addition to other drugs it sold candy, namely "Swad", and it being a Ayurvedic medicine, the assessee had paid tax @ 6%, however, the Assessing Officer was of the view that it is a confectionery item on which tax rate of 10% is applicable and accordingly issued show cause notice as to why the differential rate of 4% which is applicable on confectionery items, be not levied. It was submitted on behalf of the assessee that there is 97% of sugar in "Swad" and taking into consideration judgment of this court in the case of **CTO v. Heeralal Murlidhar** [STR 199/1988, decided on 2.7.1992], it is exempt and as per the formula written on the said candy, it consists of rock salt (*senda namak*), black salt (*kala namak*), citric acid (*nimbu ka

sat), pepper (*kali mirch*), cumin (*jeera*), carom seeds (*ajwain*), ginger powder (*sonth*) & long pepper root (*piplamool*), and after mixing all these ingredients including sugar, it is digestive and it is taken as a medicine. However, the AO was not satisfied and applied the rate of 10% and levied differential tax and interest.

3. The matter was assailed before the Dy. Commissioner (Appeals), who partly allowed the appeal granting relief on interest.

4. Both, the assessee as well as revenue, were not satisfied and preferred appeal before the Tax Board. While the assessee assailed about the rate of tax, the revenue challenged the relief on account of interest. The Tax Board was satisfied with the explanation and held that it cannot be said to be a confectionery item and it is a Ayurvedic medicine and accordingly held that the rate as shown by the assessee was justified and once the relief was granted, interest will automatically be reduced and the appeal of assessee was fully allowed.

5. Learned counsel for the petitioner contended that by no stretch of imagination it can be said to be a medicine, which is freely available in most of the shops even other than medical stores, and if it is strictly a medicine, it can only be sold in a medical store, which is duly approved on the basis of a

license, whereas it is freely sold in other shops including betel shop (*pan ki dukan*) and tea stalls, therefore, it is nothing more than a confectionery item. Learned counsel also contended that it does not target sick people. It is more like a candy and people have it just for the sake of fun, or as a mouth freshener, or for change of taste, and the ingredients mixed for preparation of "Swad" cannot be said to be Ayurved preparation. Thus, contended that both, the AO as well as the DC(A) had correctly applied the rate of 10% and the Tax Board was not justified in coming to its own conclusion, and submitted that the order of Tax Board is required to be reversed and that of the AO be upheld.

6. Per contra, learned counsel for the assessee contended that it is a Ayurvedic medicine and majority of the people, who suffer from stomach ailment does take it as a medicine and it cannot be said to be a confectionery item. If a consumer buys a candy, the shopkeeper will provide various kinds of toffee but will not give "Swad". Learned counsel also contended that it does not make any difference about whether it is freely available in betel shop or any other tea stall but ultimately after taking into consideration the formula for preparation of the said medicine, the Tax Board has correctly applied that it is a Ayurvedic medicine where only a rate of 6% is applicable, and relied upon **CCE, Chennai v. Hindustan Lever Ltd** 2015 (24) VAT Reporter 153, **CCE v. Sharma**

Chemical Works 2003 (132) STC 251, **M/s Muller & Phipps (India) Ltd. v. The Collector of Central Excise** 2004 (9) TUD 223, **Meghdoot Gramodyog Sewa Sansthan v. CCE, Lucknow** 2004 (174) ELT 14 (SC), **CCE, Allahabad v. Himtaj Ayurvedic Udyog Kendra** 2003 (154) ELT 323 (SC), **CCE, Calcutta v. Pandit D.P. Sharma** 2003 (154) ELT 324 (SC), **Calcutta Chemicals Co. Ltd. v. CCE, Chennai** 2003 (154) ELT 326 (SC), **UOI v. G.D. Pharmaceuticals Ltd & Another** 2000 (118) STC 19, **CTO, Jodhpur v. M/s Prithvi Singh** 2014 (38) TUD 269, **Panama Chemical Works v. UOI** 1992 (62) ELT 241 (M.P.), **B.Shah & Co., Surat v. State of Gujarat** 1971 (28) STC 5, **United Trading Agency v. Addl. Commissioner of Commercial Taxes, Bangalore** 1997 (104) STC 182, **Commissioner of Commercial Tax v. Dabar India Ltd.** 2000 (119) STC 37, **The State of Rajasthan & Anr v. M/s. Deys Medical Stores Ltd.** 2007 (19) TUD 97, **Commissioner of Commercial Tax, Madhya Pradesh v. Dawar Brothers** 1998 (111) STC 319, **Rashtra Deep Laboratory v. Commissioner of Sales Tax** U.P. 1983 53 STC 419, **Addl. Commissioner, Commercial Taxes v. Life Guard Distributors** 2001 (121) STC 102, **CTO v. Khandelwal Drug Agencies** [STR 358/1999, decided on 6.7.2007], **ACTO, Jaipur v. M/s. Shri Ayurved, Jaipur** [STR 159/2005, decided on 11.10.2007].

7. I have considered the arguments advanced by the learned counsel for the parties and perused the impugned order, so also the judgments minutely.

8. The petitions were admitted on the following

substantial questions of law :

> "(i) Whether the fact that Swad Tablet is consumed not for the purpose of treatment of any ailment but for the purpose of taste and pleasure and further that no medical prescription is required for its purchase and use, would not prove that it was not an Ayurved medicine, and therefore, would fall within the ambit of confectionery liable to tax at the general rate of 10% ?"

> "(ii) Whether the fact that "Swad Tablets" in the common parlance is treated as sweet confectionery like any other Chocklet and toffee and is freely available in any provisional store by demand even by any minor child would not make it a sweet confectionery under common parlance thereby attracting levy of tax at the general rate of 10% ?"

> "(iii) Whether the fact that the respondent assessee by not making the payment of tax at the normal rate of tax at 10% on sale of Swad Tablets which is covered under the entry of confectionery would not make the assessee further liable to pay interest according to provisions of Section 11B(f) of the Rajasthan Sales Tax Act ?"

9. It would be appropriate to quote the definition of Ayurvedic, Siddha or Unani drug, as given in Section 3(a) & (b) of the Drugs and Cosmetics Act, 1940 :-

> "(a) "Ayurvedic, Siddha or Unani drug" includes all medicines intended for internal or external use for or in the diagnosis, treatment, mitigation or prevention of disease or disorder in human beings or animals, and manufactured exclusively in accordance with the formulae described in, the authoritative books of Ayurvedic, Siddha and Unani Tibb systems of medicine, specified in the First Schedule;
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> (b) "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 human body or intended to be used for the destruction of 6 (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;"

10. On perusal of the above, in my view, any drug for even prevention of disease or disorder in human beings or animals, and is manufactured exclusively in accordance with the formulae prescribed in the authoritative books, can be said to fall within the definition of a "drug" and once a common parlance test is applied, after noticing the ingredients, as noticed earlier, "Swad" cannot be said to be a toffee, and one takes the same in case of a stomach disorder or for digestion purposes. It can easily be observed that majority of the ailments begin with stomach and majority of the illness emanates from stomach disorder and by & large, any human being to keep his stomach in a proper manner or condition, even for digestion purposes, takes such tablet like "Swad", which cannot be said to be a toffee or a candy. In my view, merely because it is available in a tea stall or a betel shop or other various places where confectionery items are sold, does not change the character of an item. There is no evidence on record or authoritative material put on record by the AO so that it can be said to be a confectionery item and not a drug.

11. The High Court of Madhya Pradesh, in the case of Panama Chemical Works v. UOI (supra) had an occasion to consider this very item "Swad", where it was submitted on behalf of the assessee before the High

Court that the product “Swad” is for digestion purposes, it contains ingredients commonly used for creating appetite and help in digestion. To make it tasty and eatable like other medicine, the manufacturers used the sugar base, while the liquid glucose is used as preservative and binding agent like other medicines just to preserve the properties of the drug and in general practice there is no need to mention about the preservatives and binding agents, and before the High Court two opinions of the Divisional Officer, Ayurved, Indore Division, who was declared as an expert and according to him the medicine used in the product is Ayurvedic medicines, and as per the said opinion, the addition of and proportion of sugar and liquid glucose would not change the quality of the active agents in the product. It would also be appropriate to quote the relevant paras of the judgment, which reads ad infra :-

> “32. The Divisional Director, Bharatiya Chikitsa Padhati, has been declared as an Expert by the State Government, vide Gazette Notification dated 20th April, 1985 in exercise of the powers under Rule 154(2) of the Drug and Cosmetic Rules, 1945 and the other expert Dr. Sharma has also been so declared as an Expert. According to Dr. Sharma also liquid glucose is used in Ayurvedic medicines as preservative material and binding agent and the increase or decrease in the quantity of the binding agent or preservative does not change the nature of the medicine. In both the Expert opinions it has been said that the product is a medicine containing the Ayurvedic properties.
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> 33. The Controller Food and Drugs Administration, M.P. vide Annexure P-24 has dropped the notice and in a detailed order has considered the grievance of the Collector of Customs and Excise, Indore whereupon a sample of the drug was drawn by the Drug Inspector, Indore and analysed by the Government Analyst Bhopal. This report dated 13-6-1989 has not given any opinion that the Drug is of a standard quality or not, but the drug contains liquid glucose without label declaration. However, the Drug Controller agreed with the contention of the petitioner that the liquid glucose is a preservative in Ayurvedic as well in Allopathic drugs. A letter of the Director Indigenous System of Medicines Dr. Sharma, dated 23-12-1989 was also produced, which says that liquid glucose is commonly used as preservative and binding agent and its presence has no effect on the active ingredient and the further opinion of the Expert that despite the presence of liquid glucose the

character of the drug shall remain Ayurvedic, has also been considered by the Drug Controller. Finding the aforesaid opinion and the argument sound and comparing the various ingredients in Hall's and Vicks tablets and their preparation as compared to SWAD which are licenced as Ayurvedic medicines by the State of Maharashtra and Andhra Pradesh, the Controller of Foods and Drugs Administration, Bhopal discharged the notice against the petitioner and held that the product is an Ayurvedic product. As such the fact that the Drug Controller, agreeing with the opinion of the two Experts, has reiterated its earlier finding while issuing the licence of manufacture that the product SWAD is an Ayurvedic product, supports the case of the petitioner and the aforesaid fact cannot be brushed aside simply because the assessment has to be made independently in accordance with the Central Tariff.

34. It is true that the classification of the goods has to be made according to the Central Excise Tariff. But as discussed above the Central Excise Tariff does not specifically define the product, but speaks of the Ayurvedic preparation. As such as held by the Supreme Court, Bombay High Court and the M.P. High Court in the aforementioned cases the Court has to resort to the provisions of the Cosmetics Act for ascertaining the nature of the product and when the experts in the field is available. It cannot be brushed aside lightly only because there is an averment that it is a confectionery. The deviations in the preparation as pointed out by the Central Excise Authorities were dealt with and considered by the Controller of Foods and Drugs, Government of M.P. and there is no contrary opinion of any Ayurvedic Expert to hold that the product is simply a confectionery and not a Ayurvedic product. Even in the Warner Hindustan Ltd's case (supra) decided by the CEGAT, on which much reliance is placed by the learned counsel for the Central Excise, the Authority has considered the Expert opinion and thereafter gave a finding that the expert opinion is of no avail to the manufacture in that case because the opinion of Dr. Rao was a second hand information and the qualifications of Dr. Rao were also not known to ascertain whether he was an Expert or not, coupled with the fact that there was no clinical test of the product. In the instant case the clinical test was made of the aforesaid product and after considering the result of the clinical test and the opinion of the Experts the finding of the product being an Ayurvedic product has been given. It has already been held above that there is no evidence on record that in common parlance, the product is known as a confectionery. Therefore, the scientific and technical meaning of the product are most relevant for ascertaining whether a product is an Ayurvedic product or a confectionery.

35. The Central Excise Authorities, after filing of the report of the Director, Food and Drugs, in favour of the petitioner discharging the notice issued to them have filed a rejoinder wherein it has been stated that the opinion of the Director is erroneous and should not be acted upon. We fail to understand as to how the opinion of the Experts and that of the Drug Controller can be held to be erroneous in absence of any contrary opinion of Experts being on record. Much emphasis has been laid that according to the definition of Ayurvedic preparation there is a clear interdict on the use of any ingredient than the one shown in the text and that is why the word 'only' has been used in the definition. It is manifest that the word 'only' has been used in respect of the ingredients of the product and the preservative items in a particular product cannot be treated as active ingredients. Consequently we hold that the product of the petitioner is an Ayurvedic preparation and has rightly been classified by the Assistant Collector under Item 3003.30 of the Central Excise Tariff.

36. As regards the tenability of the petition it has been

strenuously argued that the petition is premature. But as discussed above the law on the point is practically settled that the Court should not interfere in a matter at the stage on show cause notice as a general rule. But can always interfere when the notice is without jurisdiction, arbitrary or illegal. About invoking of the provisions of Section 11A also, it is the settled principle that the provisions of Section 11A are available to the authorities provided the assessee has been guilty of misrepresentation, fraud or suppression of fact etc. In view of the aforesaid discussion we do not find it either a case of fraud, misrepresentation or suppression of fact. The classification was done on the basis of the license issued by the Controller of Drugs, Govt. of M.P. and he has found that the product is an Ayurvedic product even after holding an enquiry on a show cause notice. The Central Excise Authorities have also made enquiries as discussed above before the classification. Therefore, the extended period of five years of limitation under Section 11A is not available to the Collector, Customs and Central Excise. The notice Annexure P-19 in M.P. No. 1297 of 1989, is therefore, without jurisdiction and as such this Court could very well entertain a petition in a case where the notice is without jurisdiction. The notice Annexure P-19 is, therefore, quashed. The notices Ex. P-6, P-7 and P-8 issued by the authorities are as a sequel of the notice issued in M.P. No. 1297 of 1989 and in view of the finding given by us that the product is an Ayurvedic medicine, these notices also cannot be allowed to stand which were issued during the pendency of the first petition. Accordingly these notices also deserve to be quashed and are accordingly quashed.”

12. The apex court did not entertain the SLP preferred by the Union of India and dismissed SLP (C) No.nil/1993 on 18.4.1994.

13. The burden was on the Assessing Officer if according to the AO it was a confectionery item, and it did not lead any evidence or produced any material or evidence to discharge the onus. Even the High Court of Karnataka in the case of United Trading Agency v. Addl. Commissioner of Commercial Taxes, Bangalore (supra) has even for “Vicco products”, namely tooth-paste, tooth-powder and cream, though by itself cannot be characterised as medicinal preparation but when taken into consideration the ingredients, put in the said items, held that they can be said to be having medicinal effect and even held that place of sale of such items does not make any difference even if it

is available in shops of ordinary merchandise or in chemist shops.

14. In view of what has been observed hereinbefore, in my view, the view of the Tax Board is just and proper and has rightly held that it is a Ayurvedic medicine with the rate applicable of 6%.

15. Accordingly, the question posed by the revenue are answered against the revenue and in favour of the assessee.

(JAINENDRA KUMAR RANKA) J.

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