

State of Goa and Others

Vs

Leukoplast (India) Ltd.

Civil Appeals Nos. 2461 To 2463 of 1988

(S. C. Sen, Sujata V. Manohar JJ)

27.02.1997

JUDGMENT

SEN, J. –

1. Leukoplast (India) Limited, the assessee-Company was granted a licence by the Drugs Controller under the Drugs and Cosmetics Act, 1940. It was amended on 7-9-1987. Under this licence, the assessee was entitled to produce inter alia Zinc Oxide Adhesive Plaster BPC (Leukoplast), Surgical Wound Dressing (Handyplast); Belladonna Plaster BPC; Capsicum Plaster BPC and Cotton Crape Bandages BPC (Leukocrapes).

2. The aforesaid goods or products were liable to local sales tax as well as Central sales tax and prior to 1-11-1981, the rate of the local sales tax leviable on them was at the rate of 6 per cent and under Section 8(2-A) of the Central Sales Tax Act, the rate of tax was 4 per cent. By Notification No. 14/41/81-Fin (R&C), dated 28-8-1981, drugs and medicines were exempted from the levy of local sales tax in excess of 3 per cent and thus, according to the assessee-Company, as a result of this exemption, the Central sales tax leviable under Section 8(2-A) of the Central Sales Tax Act was also reduced to 3 per cent.

3. The assessee-Company, however, had been paying Central sales tax at the rate of 4 per cent on the sale of the goods and also local sales tax at the rate of 6 per cent from 1-11-1981 to 1-4-1987.

4. By another Notification No. 5/5/87 (R&C)-8, the State of Goa in exercise of the powers under Section 10 of the Local Sales Tax Act, amended the Second Schedule to the Local Sales Tax Act, inter alia, inserting Entry No. 77 which speaks of "drugs and medicines, including all I.V. Drips". By the said notification, the goods were totally exempted from levy of the local sales tax, and consequently, the Sales Tax Authorities, ceased to collect Central Sales tax from 2-4-1987 on the above-mentioned products or goods manufactured by the assessee-Company.

5. Further, the case of the assessee is that the sales tax payable from 1-11-1981 to 1-4-1987 was at the rate of 3 per cent only and as such by two letters both dated 3-4-1987, they pointed out to the Sales Tax Officer that the goods in question were "drugs and medicines", and on and from 1-11-1981 to 1-4-1987 the said goods were liable to local and Central sales tax at the rate of 3 per cent. They further prayed for refund of the duty paid in excess of local and Central sales tax levied and collected as a result of the sales tax assessment which had been completed. They also filed revised sales tax returns for the assessment periods, 1-1-1985 to 31-12-1985 and 1-1-1986 to 31-12-1986. However, despite these two letters, no action was taken by the State of Goa as regards the claim for refund of the Central and local sales tax collected in excess. They further prayed for the completion

of the assessment proceedings which were still pending for the subsequent periods, that is, from 1-1-1983 to 31-12-1986.

6. They further contended that after the admission of the writ petition, the Assistant Sales Tax Officer made orders dated 24-12-1987 for the period commencing on 1-1-1983 and ending on 31-12-1983. He rejected the claim for refund, applying the doctrine of unjust enrichment.

7. Thereupon, the assessee-Company filed a writ petition challenging the decision of the Assistant Sales Tax Officer. The contention of the assessee was that the assessment orders should be set aside and it was entitled to the refund of the tax paid under a mistake of law and collected by the State without the authority of law. On behalf of the State, however, it was contended that the products were not "drugs and medicines" and as such no question of refund of tax paid did arise. The Court formulated two questions which had to be decided in the writ petition. The questions were :

"(a) Whether the products manufactured by the petitioners and listed in paras 2 and 4 of the petition are 'drugs and medicines' within the purview of the aforesaid Notifications No. 14/41/81-Fin (R&C) and No. 5/5/87 (R&C)-8, and

(b) whether the petitioners are entitled to the refund sought."

8. After a long discussion about the nature of the products of the assessee-Company and after referring to Pharmaceutical Codex incorporating the British Pharmaceutical Codex, the meaning given to "drugs and medicines" in Drugs and Cosmetics Act and also to the understanding of the phrase "drugs and medicines" by the Excise Authorities, and several affidavits filed on behalf of the assessee, the High Court came to the decision that the products manufactured by the assessee-Company had to be treated as "drugs and medicines" and the writ petition was entitled to succeed.

9. There was a second writ petition in which the dispute was in respect of entitlement to refund of tax payable under a mistake of law. Following the decision in the first writ petition, the second writ petition was also decided in favour of the assessee-Company with some modifications.

10. The State has come up in appeal. We have heard the case in extenso. The dispute basically centres around the contention of the assessee that its products like Zinc Oxide Adhesive Plaster BPC (Leukoplast), Surgical Wound Dressing (Handyplast); Belladonna Plaster BPC; Capsicum Plaster BPC and Cotton Crape Bandages BPC (Leukocrapes) can be treated as "drugs and medicines". The assessee's contention that it has got a licence to manufacture these products under the Drug 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 question 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.

11. In fact, the difficulty of defining what are drugs and medicines was discussed in the case of Customs and Excise Commrs. v. Beecham Foods Ltd. [(1972) 1 WLR 241 : (1972) 1 All ER 498, HL], where the question was whether Ribena black currant juice BPC could be treated as a drug or

medicine. The plaintiff's case was that this product consisted of syrup of black currant made in accordance with the British Pharmaceutical Codex and containing some natural Vitamin C and a syrup made in accordance with the British Pharmacopoeia and synthesised Vitamin C. It had a prophylactic function when taken by those who needed Vitamin C. It was sold and advertised on the basis of that function. The plaintiffs sought a declaration that Ribena was a "drug or medicine" and was entitled to the benefit of exemption from Purchase Tax Act, 1936. It was held by the House of Lords that Ribena could not be treated as a drug or medicine. In coming to this decision certain interesting observations were made which have to be borne in mind.

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 [Beecham Foods Ltd. v. Customs and Excise Commrs., (1969) 1 WLR 1518 : (1969) 3 All ER 135] 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.

15. In our view, whether the products manufactured by the assessee can be treated as "drugs or medicines" cannot be answered straightaway. 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. There was no reason for the assessee-Company to bypass the statutory remedy and come to the court with a writ petition. These questions basically of fact should be agitated before the statutory appellate authority.

16. In the case of Titaghur Paper Mills Co. Ltd. v. State of Orissa [(1983) 2 SCC 433 : 1983 SCC (Tax) 131 : (1983) 142 ITR 663] a Bench of three Judges of this Court pointed out the inadvisability of entertaining a writ petition questioning a sales tax assessment. This Court held : (SCC p. 440 para 11)

"Under the scheme of the Act, there is a hierarchy of authorities before which the petitioners can get adequate redress against the wrongful acts complained of. The petitioners have the right to prefer an appeal before the prescribed authority under sub-section (1) of Section 23 of the Act. If the petitioners are dissatisfied with the decision in the appeal, they can prefer a further appeal to the Tribunal under sub-section (2) of Section 23 of the Act, and then ask for a case to be stated upon a question of law for the opinion of the High Court under Section 24 of the Act. The Act provides for a complete machinery to challenge an order of assessment, and the impugned orders of assessment can only be challenged by the mode prescribed by the Act and not by a petition under Article 226 of the Constitution."

17. We are of the view that the assessee should not have been allowed to bypass the statutory remedies where the questions of fact could have been properly agitated and ascertained.

18. The appeal, therefore, is allowed. The impugned order of the High Court is set aside.

19. The assessee-Company will be at liberty to prefer appeal against the assessment order in accordance with law within a period of six weeks from date. If such appeal is preferred within the said period six weeks, the appellate authority will entertain the appeal without raising any question of limitation. All the questions of fact and law are left to be decided by the appellate authority.

20. There will be no order as to costs.

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21. In view of our decision in Civil Appeal No. 2461 of 1988, the above appeals are also allowed. There will be no order as to costs.