SUPREME COURT OF INDIA

State of Andhra Pradesh

Vs.

Linde India Ltd.

C.A.No.2230 of 2020

(Dr.D.Y.Chandrachud and Ajay Rastogi,JJ.,)

13.04.2020

JUDGMENT

Dr.D.Y.Chandrachud,J.,

SLP(C)No.19208 of 2016

1. Leave granted.

2. The short point of law that arises in the present appeals is whether 'Medical Oxygen IP' and 'Nitrous Oxide IP' are taxable under Entry 88 of Schedule IV of the Andhra Pradesh *Value Added Tax Act 2005*[1] or as 'unclassified goods' under Schedule V . The classification of the two products determines the rate of tax to be levied on them - *4%/5%*[2] *under Entry 88 or 12.5%/14%*[3] under Schedule V.

3. The facts in the appeals before this Court being similar, we proceed to elucidate the factual context of the lead appeal.

4. The respondent - Linde India Ltd, is a registered company under the 2005 Act and is an assessee on the rolls of the Commercial Tax Officer, Gajuwaka and Dwarakanagar Circle. The respondent is engaged in the manufacturing and trading of industrial gases as well as Medical Oxygen IP and Nitrous Oxide IP. On 12 December 2005, the Commercial Tax Officer communicated to the respondent that an outstanding tax liability of Rs 5,11,062 was due and payable for the period between 1 August 2005 and 31 August 2005.

5. Aggrieved, the respondent filled an appeal before the Appellate Deputy Commissioner who, by his order dated 26 June 2006, affirmed the assessment of the Commercial Tax Officer. By an order dated 25 November 2014, the Sales Tax Appellate Tribunal, relying on a judgment of the Andhra Pradesh High Court in *Inox Air Products Ltd v The Assistant Commissioner (CT), Hyderabad*[4], allowed the appeal filed by the respondent. The appellant's appeal before the High Court for the State of Telangana and the State of Andhra Pradesh was dismissed. Aggrieved, the appellant is in appeal before this Court.

6. The High Court was of the view that in Section 3(b)(i) of the Drugs and Cosmetics Act 1940[5] the expression 'drug' covers within its ambit any substance which is used for or in the treatment, prevention and mitigation of a disease or a disorder. The High Court held that (i) Medical Oxygen IP is used for the treatment of patients and to mitigate the intensity of diseases and disorders; and (ii) Nitrous Oxide IP is used as an anesthetic in surgical operations and procedures of a short duration. The High Court held:

> "...Both "nitrous oxide" and "medical oxygen" are clearly identifiable, and are used as surgical aids (Indian Oxygen Ltd. State of Karnataka; Southern Gas Ltd). Going by the user test and the functional test, it is evident that "medical oxygen" and "nitrous oxide" serve as medicines. As 'medical oxygen IP' and 'Nitrous Oxide IP' are used in the treatment and mitigation of disorders in human beings, and as they are generally understood in the trade to be surgical aids, both these substances would fall under the definition of 'drug' under Section 3(b)(i) of the Drugs Act, and consequently, fall under Entry 88 of Schedule IV of the Act liable to tax only at 4%/5%"

7. Assailing the judgment of the High Court, learned counsel for the appellant urged:

> (i) The decision of the Andhra Pradesh High Court in Inox Air, in so far as it held that Medical Oxygen IP and Nitrous Oxide IP are covered by the expression "similar articles" in Entry 88, is erroneous. Applying the principle of ejusdem generis, it cannot be said that gases are 'similar articles' to the other products specified in the entry;
>
> (ii) The term 'used for or in' employed in Section 3(b)(i) qualifies only 'substances' and not 'medicines'. Consequently, it cannot be used to broaden the scope of Entry 88;
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> (iii) Though Section 3(b)(i) of the 1940 Act includes substances that are necessary aids for treating surgical or other cases, Entry 88 also contains an exclusion clause. Entry 100(36) of Schedule IV specifically excludes "medical grade oxygen". Absent a specific inclusion of Medical Oxygen IP and Nitrous Oxide IP in Entry 88, they fall within the ambit of unclassified goods in Schedule V; and
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> (iv) Every 'substance' cannot be said to fall within the ambit of Entry 88 merely because it is used for medicinal purposes. For a substance to fall within the ambit of Entry 88, it must accord with the definition stipulated in Section 3(1)(b) of the 1940 Act.

8. Opposing the above submissions, learned counsel for the respondents urged:

> (i) Section 3(b)(i) of the 1940 Act defines a 'drug' broadly as a medicine or substance used for or in the diagnosis, treatment, mitigation or prevention of any disease or disorder. Medical Oxygen IP and Nitrous Oxide IP are widely known for their curative properties and as medicines in the diagnosis, treatment, mitigation and prevention of diseases and disorders;

(ii) Medical Oxygen and Nitrous Oxide are included in the Indian Pharmacopoeia which prescribes standards for drugs. The Indian Pharmacopoeia has legal status under Section 16 of the 1940 Act. Consequently, Medical Oxygen and Nitrous Oxide are drugs within the ambit of Section 3(1)(b) of the 1940 Act. As Medical Oxygen IP and Nitrous Oxide IP are 'medicines' within the ambit of Section 3(1)(b) of the 1940 Act, they are expressly included in Entry 88 of the 2005 Act;

(iii) Goods must be classified according to their popular meaning or as they are understood in their commercial sense. Oxygen is used widely as an emergency medicine as well as for the delivery of medical services. Nitrous Oxide is used in surgery and dentistry for anesthetic purposes. Applying the common parlance test, there is no doubt that the products in question are used in the mitigation of diseases and disorders and fall

(iv) Several High Courts in the country have uniformly held that Medical Oxygen IP and Nitrous Oxide IP are medicines within the meaning of their respective state enactments. These include *Southern Gas v State of Kerala*[6], *State of Tamil Nadu v Ram Oxygen*[7], *Panki Oxygen v State of Uttar Pradesh*[8], *Chimanlal v State of Maharashtra*[9], *Indian Oxygen v State of Karnataka*[10], *State of Kerala v Indian Oxygen and ACTO*[11], *Special Circle Jodhpur v M/s Jodhpur Gases*[12];

(v) The National List of Essential Medicines 2011 which constitutes Schedule I of 9the Drug Price (Control) Order 2013, includes 'Oxygen' and 'Nitrous Oxide' as 'anesthesia' under Section 1; and

(vi) The decision of the High Court from which the present appeal arises was rightly based on the judgment of that High Court in Inox Air, both of which must be upheld by this Court.

9. The rival submissions fall for consideration.

10. We must begin with the statutory framework. Schedule IV of the 2005 Act prescribes a uniform tax rate of 4%/5% for listed goods. Entry 88 of Schedule IV reads as follows:

"Drugs & Medicines whether patent or proprietary, as defined in clauses (i), (ii) and (iii) of Section 3(b) of Drugs and Cosmetics Act, 1940 (Central Act 23 of 1940), including hypodermic syringes, hypodermic needles, catguts, sutures, surgical cotton, dressing, plasters, catherters, cannulae, bandages and similar articles but not including:

(a) Medicated goods;

(b) Products capable of being used as cosmetics and toilet preparations including Toothpastes, Tooth powders, cosmetics, Toilet articles and soaps; and

(c) Mosquito repellents in any form." Entry 88 includes drugs and medicines, whether patent or proprietary as defined in clauses (i), (ii) and (iii) of Section 3(b) of the 1940 Act. Any drug or medicine that falls within the ambit of clauses (i), (ii)

and (iii) of Section 3(b) falls within the ambit of Schedule IV. Entry 88 also stipulates that hypodermic syringes, hypodermic needles, catguts, sutures, surgical cotton, dressing, plasters, catherters, cannulae, bandages and 'similar articles' are also included, save and except for the three specified exclusions.

11. Schedule V of the 2005 Act reads thus: "Goods taxable at standard rate (RNR) of [14.5%] All goods other than those specified in Schedules I, III, IV, VI." Schedule V stipulates that all goods that do not fall within the ambit of Schedules I, III, IV, and VI shall be taxed at a rate of 14.5%.

12. Section 3(b) of the 1940 Act defines a "drug" in the following terms:

> "(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;
>
> (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."
>
> Clause (i) of Section 3(b) defines a drug as 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 being, or animals", including specified preparations. Clause (iv) of Section 3(b) includes all 'devices' intended for internal or external use in the diagnosis, treatment, mitigation or prevention of disease or disorder in human beings or animals.

13. In the early decision of this Court in *Chimanlal Jagjivandas Sheth v State of Maharashtra*[13], the question before a four judge Bench was whether absorbent cotton wool, roller bandages, and gauzes would fall within the ambit of Section 3(b) of the Act of 1940. The Court held:

> "3. The said definition of "drugs" is comprehensive enough to take in not only medicines but also substances intended to be used for or in the treatment of diseases of human beings or animals. This artificial definition introduces a distinction between medicines and substances which are not medicines strictly so-called. The expression "substances", therefore, must be something other than medicines but which are used for treatment. The part of the definition which is material for the present case is "substances intended to be used for or in the treatment". The appropriate meaning of the expression "substances" in the section is "things"'. It cannot be disputed, and indeed it is not disputed, that absorbent cotton wool, roller bandages and gauze are "substances" within the meaning of the said expression. If so, the next question is whether they are used for or in "treatment". It is not necessary for the purpose of this appeal to define

> exhaustively "the substances" falling within the definition of "drugs"; and we consider that whether or not surgical instruments are "drugs", the articles concerned in this case are."
>
> (Emphasis supplied)

This Court held that the comprehensive nature of the definition includes both medicines and something other than medicines, but which are used for treatment. In that case, the question concerned whether absorbent cotton wool, roller bandages and gauze are 'substances' within the ambit of Section 3(b). It is in that context that this Court held that substances are 'things'. The Court clarified that it was not necessary to exhaustively define 'the substances' which fall within the ambit of drugs as defined in Section 3(b). A substance may be a product, which though not specifically used as a medicine is used for diagnosis, treatment, mitigation *or prevention of diseases.*[14] Where a product other than a medicine is intended to be used for or in the diagnosis, treatment, mitigation or prevention of any disease or disorder, the same would be a 'substance' falling within the ambit of Section 3(b)(i).

14. The learned counsel for the appellants urged that the phrase "intended to be used for or in the diagnosis, treatment, mitigation or prevention of any disease or disorder" in Section 3(b)(i) is only applicable to 'substances' and not 'medicines'. In *AC Ishwar Singh Bindra v The State of UP*[15], the central question before a three judge Bench of this Court was the interpretation of Section 3(b)(i) of the 1940 Act. This Court held:

> "11. Now if the expression "substances" is to be taken to mean something other than "medicine" as has been held in our previous decision it becomes difficult to understand how the word "and" as used in the definition of drug in Section 3(b)(i) between "medicines" and "substances" could have been intended to have been used conjunctively. It would be much more appropriate in the context to read it disjunctively. In Stroud's Judicial Dictionary, 3rd Edn. it is stated at p. 135 that "and" has generally a cumulative sense, requiring the fulfilment of all the conditions that it joins together, and herein it is the antithesis of or. Sometimes, however, even in such a connection, it is, by force of a contexts, read as "or". Similarly, in Maxwell on Interpretation of Statutes, 11th Edn., it has been accepted that "to carry out the intention of the legislature it is occasionally found necessary to read the conjunctions 'or' and 'and' one for the other".

This Court held that as the word 'substances' in the clause is used to mean something other than 'medicine', it was not the intention of the legislature that the word "and" was meant to be read conjunctively. Accordingly, this Court held that the two parts of the definitional clause must be read disjunctively.

15. In the above view, Section 3(b)(i) stipulates that medicines or substances used for or in the diagnosis, treatment, mitigation or prevention of any disease or disorder in human beings, or animals shall be included within the ambit of the definition. It is significant to note the use of the phrase 'for or in' in the definitional clause. Section 3(b)(i) includes both medicines or substances used for the diagnosis, treatment, mitigation or prevention of any disease or disorder or in the diagnosis, treatment, mitigation or prevention of any

disease or disorder. Where the former highlights the direct use of the product in question in diagnosing, treating, mitigating or preventing a disease or disorder, the latter highlights its instrumental use as a facilitative agent in the diagnosis, treatment, mitigation or prevention of any disease or disorder. The relevant enquiry for this Court is whether Medical Oxygen IP and Nitrous Oxide IP are used in or for any of the purposes specified therein.

16. The term 'medicine' is not defined in the 1940 Act. It is a trite principle of interpretation that the words of a statute must be construed according to the plain, literal and grammatical meaning of the words. Justice G P Singh in his seminal work Principles of Statutory Interpretation states:

> "The words of a statute are first understood in their natural, ordinary or popular sense and phrases and sentences are construed according to their grammatical meaning, unless that leads to some absurdity or unless there is something in the context or in the object of the statute to suggest the contrary.in the statement of the rule, the epithets 'natural', 'ordinary', 'literal', grammatical' and 'popular' are employed almost interchangeably. It is often said that a word, apart from having a natural, ordinary or popular meaning (including other synonyms i.e. literal, grammatical and primary), may have a secondary meaning which is less common e.g technical or scientific meaning. But once it is accepted that natural, ordinary or popular meaning of the word is derived from its context, the distinction drawn between different meanings loses much of its relevance."
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> Similarly, Craies on Statute Law states:
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> "One of the basic principles of interpretation of Statutes is to construe them according to plain, literal and grammatical meaning of the words. If that is contrary to, or inconsistent with, any express intention or declared purpose of the Statute, or if it would involve any absurdity, repugnancy or inconsistency, the grammatical sense must then be modified, extended or abridged, so far as to avoid such an inconvenience, but no further. The onus of showing that the words do not mean what they say lies heavily on the party who alleges it. He must advance something which clearly shows that the grammatical construction would be repugnant to the intention of the Act or lead to some manifest absurdity."
>
> The words of a statute should be first understood in their natural, ordinary or popular sense and phrases and sentences should be construed according to their grammatical meaning, unless that leads to some absurdity or unless there is something in the context, or in the object of the statute to suggest the contrary. Where a word has a secondary meaning, the assessment is whether the natural, ordinary or popular meaning flows from the context in which the word has been employed. In such cases, the distinction disappears and courts must adopt the meaning which flows as a matter of plain interpretation and the context in which the word appears.

17. In *State of HP v Pawan Kumar*[16], it was contended that the safeguards provided in Section 50 of the Narcotics Drugs and Psychotropic Substances Act 1985 regarding

search of any person would also apply to any bag, briefcase or any such article or container, which is being carried by the person. The word 'person' was not defined in the Act. A three judge Bench of this Court, having regard to the scheme of the Act and the context in which the word - 'person' has been used, rejected the contention and held thus:

> "8. One of the basic principles of interpretation of statutes is to construe them according to plain, literal and grammatical meaning of the words. If that is contrary to, or inconsistent with, any express intention or declared purpose of the statute, or if it would involve any absurdity, repugnancy or inconsistency, the grammatical sense must then be modified, extended or abridged, so far as to avoid such an inconvenience, but no further. The onus of showing that the words do not mean what they say lies heavily on the party who alleges it. He must advance something which clearly shows that the grammatical construction would be repugnant to the intention of the Act or lead to some manifest absurdity."

The above canon of statutory interpretation has been consistently followed by this Court in *State of Himachal Pradesh v Pawan Kumar*[17], *State of Haryana v Suresh*[18], *State of Rajasthan v Babu Ram*[19] *and Commissioner of Customs (Import), Mumbai v Dilip Kumar and Company*[20].

18. The word 'medicine' is defined in Black's Law Dictionary thus:

> "Medicine - the science and art dealing with the prevention, cure and alleviation of diseases; in a narrower sense that part of science and art of restoring and preserving health which is the province of the physician as distinguished from the surgeon and obstetrician."
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> CollIns Dictionary for Advanced Learners defines 'medicine' thus:
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> "Medicine is the treatment of illness and injuries by doctors and nurses; is a substance that you drink or swallow to cure an illness" Cambridge Dictionary defines 'medicine' as: "A drug that is used to treat illness or injury; the science dealing with the preserving of health and with preventing and treating disease or injury."
>
> The ordinary or popular understanding of the term medicine is characterized by its curative properties in general andspecifically, its use for or in diagnosis, treatment, mitigation or prevention of any disease or disorder.

19. In *State of Goa v Leukoplast (India) Ltd*[21], the question before this Court concerned whether Zinc Oxide Adhesive Plaster BPC (Leukoplast), Surgical Wound Dressing (Handyplast), Belladona Plaster BPC, Capsicum Plaster BPC and Cotton Crape Bandages BPC (Leukocrapes) are 'drugs' or 'medicine' under the 1940 Act. A two judge Bench of this Court laid down the test to determine whether a product is a medicine in the following terms:

> "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?..."

This Court held that the relevant enquiry is whether the product is understood to be a medicine and is used to cure, alleviate or prevent disease or to restore health or preserve health. The question in the present case does not concern all variants of oxygen and nitrogen, but only Medical Oxygen IP and Nitrous Oxide IP.

20. Chapter IV of the 1940 Act is titled 'Manufacture, Sale and Distribution of Drugs and Cosmetics'. Section 16 stipulates:

"16. Standards of quality.- (1) For the purposes of this Chapter, the expression "standard quality" means -

(a) In relation to a drug, that the drug complies with the standard set out in the Second Schedule, and

(b) In relation to a cosmetic, that the cosmetic complies with such standards as may be prescribed."

Section 16(1)(a) stipulates that drugs that comply with the standards set out in the Second Schedule shall be certified to be of 'standard quality' under the 1940 Act. The Second Schedule is titled 'Standards to be complied with by Imported Drugs and by Drugs manufactured for Sale, Stocked, or Exhibited for Sale or Distributed.' Entry 5 of the Second Schedule reads:

"5. Other drugs -Drugs included in the Indian Pharmacopeia. Standards of identity, purity and strength specified in the edition of the India Pharmacopoeia for the first time being in force and such other standards as may be prescribed. In case the standards of identity, purity and strength of the drugs are not specified in the edition of the Indian Pharmacopoeia for the time being in force but are specified in the edition of the Indian Pharmacopoeia immediately preceding the standards of identity, purity and strength shall be those occurring in such immediately preceding edition of the Indian Pharmacopoeia and such other standards as may be prescribed."

21. Drugs specified in the Second Schedule are required under the 1940 Act to comply with specified standards. Entry 5 prescribes that 'other drugs' means drugs included in the Indian Pharmacopeia, for which standards are specified therein. The *Indian Pharmacopoeia Commission*[22] is an autonomous institution of the Ministry of Health and Family Welfare, Government of India. The IPC, through its publication titled 'Indian Pharmacopoeia' prescribes standards for the identity, purity and strength of the drugs specified therein. Medical oxygen (at 99.9% purity) is included as a drug termed as 'Oxygen IP'. Section 16, read with the Second Schedule and the specification of Medical Oxygen in the Indian Pharmacopoeia lends support to the contention urged by the respondents that Medical Oxygen IP is a drug as defined in Section 3(b)(i) of the 1940 Act.

22. Furthermore, in exercise of the powers conferred by Section 3 of the Essential Commodities Act 1955, the Central Government issued the Drug (Prices Control) Order 2013 which came into force on the date of its publication in the Official Gazette (15 May 2013). Para 2(t) stipulates that the 'National List of Essential Medicines' means the National List of Essential Medicines 2011 published by the Ministry of Health and Family Welfare as updated and revised from time to time. It also specifies that the National List of Essential Medicines 2011 is included in the First Schedule to the order. Para 2(2) stipulates that all other words and expressions used therein and not defined, but defined in the 1940 Act shall have meanings respectively assigned in the 1940 Act.

23. The First Schedule contains the National List of Essential Medicines 2011. The relevant portion is extracted below:

"Schedule – I
(See paragraphs – 2(t), 2(zb))
Symbols P, S and T appearing in NLEM 2011 denote essentially at Primary, Secondary and Tertiary levels respectively.

NATIONAL LIST OF ESSENTIAL MEDICINES 2011			
Section: 1 – Anesthesia			
1.1 General Anesthetics and Oxygen			
Medicines	Category	Route of Administration	Strengths
…	…	…	…
Nitrous Oxide	P, S, T	Inhalation	
Oxygen	P, S, T	Inhalation	

1.1 General Anesthetics and Oxygen Medicines Category Route of Administration Strengths Nitrous Oxide P, S, T Inhalation Oxygen P, S, T Inhalation Section 1.1 includes both Nitrous Oxide and Oxygen as medicines within the ambit of 'Anesthesia'. In the exercise of the power conferred under the 2013 Order, the Government of India, by its order dated 20 December 2013 prescribed the selling price for both "Nitrous Oxide Inhalation" and "Oxygen Inhalation". This was evidently done keeping in mind the regulation of the selling prices of essential medicines in the market. The inclusion of Oxygen and Nitrous Oxide as Anesthesia lends support to its use in the diagnosis and treatment of a disorder or disease as specified in Section 3(b)(1) of the 1940 Act.

24. Learned counsel for the respondents relied on the judgments of various High Courts which have emphasized the medicinal properties of Medical Oxygen IP and no Nitrous Oxide IP. In *Southern Gas Ltd. v State of Kerala*[23], the question before the High Court of Kerala was whether Medical Oxygen and Nitrous Oxide were 'medicines' for the purpose

of tax assessment under the Kerala General Sales Tax Act 1963. Answering this in the affirmative, the Kerala High Court held:

> "In the instant case, as already noted, the assessee, who is the manufacturer of "medical oxygen" and "nitrous oxide", has clearly stated that these two items are manufactured only for use in hospitals and that the dominant use of these two items are only as medicines...There is no dispute that "medical oxygen" is used for administering it on patients. Similarly, the function of "nitrous oxide" is to act as an anesthetic agent. Thus, going by the user test and the functional test, it is evident that "medical oxygen" and "nitrous oxide" are served as medicines."

Applying the user test and functional test, the Kerala High Court noted that Medical Oxygen is administered to patients and Nitrous Oxide is used as an anesthetic agent and concluded that both are medicines.

25. In *Indian Oxygen Ltd v State of Karnataka*[24], the question before the High Court of Karnataka concerned whether Medical Oxygen fell within the ambit of Entry 121 of the Karnataka Sales Tax Act 1957 which stipulated a tax rate for industrial gases. The High Court answered this in the negative and drew a distinction between industrial oxygen and medical oxygen in the following terms:

> "The object of Entry 121 is clearly to attract an "industrial gas", which cannot, on the face of it include, a gas which is not considered as an "industrial gas" by those who deal in it. It is clear that a person requiring "medical oxygen" will not be satisfied if he is supplied with the "industrial oxygen" and similarly an honest trader would not sell "medical oxygen" as "industrial oxygen".

26. In *State of Tamil Nadu v Ram Oxygen (Pvt.) Ltd*[25], the High Court of Madras held that medical oxygen is a 'drug' within the ambit of the 1940 Act:

> "...It is also not in dispute that medical oxygen has 99.9% purity of purified oxygen and that its use is only for treatment of patients and to mitigate contrary intensity of any disease or disorders in human beings. It is common knowledge at times of emergency, the application of 'medical oxygen' is resorted to in order to prevent any sudden collapse of a patient, which process is nothing but part of a treatment meted out to a patient to recoup the deterioration of health conditions."

The Madras High Court noted that at times of emergency, the administration of medical oxygen is resorted to prevent the sudden collapse of patients, which forms a part of the treatment meted out to them.

27. In *Panki Oxygen v State of Uttar Pradesh*[26], the question before the High Court of Allahabad was whether tax on Oxygen IP under the Uttar Pradesh Trade Tax Act was to be levied under the Entry "Medicine and Pharmaceutical Preparation" or under the Entry "Oxygen and other gases". Justice Ashok Bhushan (sitting as a judge of that High Court) relied on the above decisions of various High Courts and held thus:

> "In view of the above, we are of the view that oxygen (IP) is fully covered by Entry 26 of the notification dated 15.1.2000 i.e. "medicines and pharmaceutical preparation" and shall not be covered by Entry 47 of the notification dated 29.1.2001 which relates to "oxygen and other gases". The oxygen (IP) i.e. medicinal oxygen being a drug fully covered by Entry 26 of the notification dated 15.1.2000 cannot be included in the general entry i.e. Entry 47 of the notification dated 29.1.2001."

28. In Inox Air, the question before the High Court of Andhra Pradesh was whether Liquid Medical Oxygen IP, Medical Grade Oxygen and Nitrous Oxide IP are liable to be taxed under Entry 88 of the 2005 Act. The High Court held:

> "As medical oxygen LP and nitrous oxide LP are used in the treatment and mitigation of disorders in human beings, and as they are generally understood in the trade to be surgical aids, both these substances would fall under the definition of drug under Section 3(b)(1) of the Drugs Act, and consequently, fall under Entry 88 of Schedule IV of the Act. Viewed from any angle, both medical oxygen IP and Nitrous Oxide IP fall under Entry 88 of Schedule IV and are liable to tax only at 4%/5% and not at12.5% or 14.5%." The High Court held that medical oxygen is used in the treatment and mitigation of disorders in human beings, and are generally understood in trade to be surgical aids.

29. The above judgments highlight the curative and instrumental use of Medical Oxygen IP and Nitrous Oxide IP in the mitigation and prevention of disease or disorder. Nitrous Oxide is used as anesthetic agent. Medical oxygen with 99.9% purity is predominantly used in hospitals. Medical Oxygen is also used for the treatment of patients and to mitigate the intensity of disease or disorder in human beings. It is utilised to prevent a sudden collapse of patients and to aid in the recovery of health. As stated in the Counter Affidavit filed by the respondents, in order to carry out critical surgical procedures, supplemental oxygen is administered to patients. Medical Oxygen is also administered in resuscitation, major trauma, anaphylaxis, major hemorrhage, shock and active convulsions, amongst other conditions.

30. Nitrous Oxide is used in surgery and dentistry for its anesthetic and analgesic effects. An article published in the British Medical Bulletin titled *'Past, Present and Future of Nitrous Oxide'*[27] highlights the medical use of Nitrous Oxide in the following terms:

> "As an anaesthetic gas, N2O has many unique properties that have historically been used to produces analgesia equivalent to that produced by conventional doses of morphine.
>
> 3. Nitrous oxide The patient is made to breathe 100% oxygen through a nose piece or hood and N2O is added in 10% increments (to a maximum of 50%, rarely 70%) till the desired level of sedation assessed by constant verbal contact is obtained. This is maintained till the great benefit in the operating room. These include a high FA/FI ratio allowing for rapid onset and offset, anxiolytic as well as analgesic and amnestic properties, lack of an odour and lack of irritation to the tracheobronchial tree. These same properties have made it increasingly popular in areas outside of

the OR including paediatric procedural sedation, the emergency room, obstetrics, and potentially psychiatry, for attenuation of treatment-resistant depression."

The World Health Organisation in its publication titled 'Model Prescribing no Information: *Drugs Used in Anesthesia*[28]' states that Nitrous Oxide has the following uses:

"Maintenance of surgical anaesthesia in combination with other anaesthetic agents (halothane, ether, thiopental or ketamine) and muscle relaxants. In subanaesthetic doses, to provide analgesia for obstetric practice, for emergency management of injuries, during postoperative physiotherapy and for refractory pain in terminal illness."

K D Tripathi in Essentials of Medical Pharmacology[29] states:

"INHALATIONAL ANAESTHETICS

1. Nitrous oxide (N2O) It is a colourless, odourless, heavier than air, noninflammable gas supplied under pressure in steel cylinders. It is nonirritating, but low potency anaesthetic; unconsciousness cannot be produced in all individuals without concomitant hypoxia; MAC is 105% implying that even pure N2O cannot produce adequate anaesthesia at 1 atmosphere pressure. Patients maintained on 70% N2O + 30% O2 along with muscle relaxants often recall the events during anaesthesia, but some lose awareness completely. Nitrous oxide is a good analgesic; even 20% procedure is performed. Thereafter, N2O is switched off, but 100% O2 is continued for next 5 min. The patient is generally roadworthy in 30-60 min."

The above extracts demonstrate the medical use of Nitrous Oxide as a general anesthetic as well as in operation rooms for its analgesic and anxiolytic properties.

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

32. The impugned judgment of the High Court, to the extent it held that Medical Oxygen IP and Nitrous Oxide IP fall within Entry 88 of the 2005 Act is upheld.

33. The appeals are dismissed, although for the reasons highlighted above. There shall be no order as to costs.

34. Pending application(s), if any, shall stand disposed of.

Judgment Referred.

[1](2005) Act

[2] 5% substituted for the figure 4% by Act 11 of 2012 dated 20 April 2012.

[3] 14.5% substituted for the figure 12.5% by Act 9 of 2010 dated 20 April 2010.

[4] (2014) VIL 339 AP

[5]1940 Act

[6] (2005)(139) STC 0504 (Ker)

[7] (2011) 5 GST 87 (Mad HC)

[8] (2014) SCC Online All 2144

[9](2004) (137) STC 0068

[10](1990) 79 STC 0351

[11](2003)(129) STC 0471

[12](2009) SCC Online 2459

[13]AIR 1963 SC 0665

[14] Barium, for example, is a substance used as an element in the diagnostic process in X-rays.

[15](1969) 1 SCR 0219

[16] (2005) 4 SCC 0550

[17](2005) Cr.L.J. (SC) 2008

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