

IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

R/SPECIAL CIVIL APPLICATION NO. 8320 of 2019

FOR APPROVAL AND SIGNATURE:

HONOURABLE MS.JUSTICE HARSHA DEVANI

and

HONOURABLE MS. JUSTICE SANGEETA K. VISHEN

1	Whether Reporters of Local Papers may be allowed to see the judgment ?	
2	To be referred to the Reporter or not ?	
3	Whether their Lordships wish to see the fair copy of the judgment ?	
4	Whether this case involves a substantial question of law as to the interpretation of the Constitution of India or any order made thereunder ?	

**M/S GUJARAT CO-OPERATIVE MILK MARKETING FEDERATION LIMITED
THRU. GENERAL MANAGER (FINANCE) ATULKUMA
Versus
UNION OF INDIA**

Appearance:

AMAL PARESH DAVE(8961) for the Petitioner(s) No. 1,2,3,4,5
MR PARESH M DAVE(260) for the Petitioner(s) No. 1,2,3,4,5
MS TRUSHA K PATEL(2434) for the Respondent(s) No. 1,2
RULE NOT RECD BACK(63) for the Respondent(s) No. 4
VIRAL K SHAH(5210) for the Respondent(s) No. 3

CORAM:HONOURABLE MS.JUSTICE HARSHA DEVANI

and

HONOURABLE MS. JUSTICE SANGEETA K. VISHEN

Date : 13/12/2019

ORAL JUDGMENT

(PER: HONOURABLE MS.JUSTICE HARSHA DEVANI)

1. By this petition under article 226 of the Constitution of India, the petitioners have challenged the letter/circular F

No.354/292/2018-TRU dated 9.8.2018 issued by the Government of India through the Tax Research Unit (hereinafter referred to as "TRU"). The petitioners also seek a declaration that milk chilling and packing services provided by the contractors to the petitioners' dairies are exempted by virtue of serial No.24 of the table to Notification No.11/2017 – Central Tax (Rate) dated 28.6.2017. The petitioners also seek a direction to the respondents to return the amount recovered and collected from the petitioners through their contractors as GST on milk chilling and packing services.

2. The petitioner No.1 – M/s. Gujarat Co-operative Milk Marketing Federation Limited is a co-operative society, registered under the Gujarat Co-operative Societies Act, 1961. The Federation is an apex body for marketing of milk and milk products produced by the various District Co-operative Milk Producers Unions which are co-operative societies of farmers and agriculturists of various districts and are also registered as co-operative societies under the said Act. The petitioners No.2 to 5 are four of such district co-operative societies which are members of the Federation. The petitioners No.2 to 5 are operating plants popularly known as dairies for production of milk and milk products.

3. The dairies are engaged in the activities of producing milk and milk products on co-operative principles and the goods so produced by the dairies are sold and marketed by the Federation.

4. Prior to 1.7.2017, that is before the goods and service tax laws came into force, the goods produced by the dairies were excisable goods covered under various chapters of the first

Schedule to the Central Excise Tariff Act, 1985. Prior to 1.7.2017, a few of the products were chargeable to excise duty, whereas most of the products like milk, milk powder, etc. were chargeable to nil rate of excise duty. Most of the activities like chilling of milk and packing of milk were also not chargeable to any central excise duty or service tax at that time.

5. In the normal course of their activities, the petitioners No.2 to 5 have engaged various contractors for maintaining and operating milk chilling centers, where milk belonging to the dairies is stored at a particular temperature. In addition to providing such services of chilling and storing of milk, the contractors are also providing packing service to the dairies in respect of pouch packing of milk. Regular agreements are made between the dairies and such contractors, most of whom are individuals or firm of individuals.

6. It is the case of the petitioners that the dairies have been paying milk chilling charges as well as packing charges to the service providers in accordance with the rates agreed between the parties. The charges are paid by the dairies based on the quantum of work executed or service rendered by the contractors and the packing charges are paid on the quantum of milk packed. The dairies have made payment to the contractors in accordance with such invoices, which according to the petitioners have always been in accordance with rates agreed under the agreements between the parties.

7. After the introduction of the goods and service tax laws with effect from 1.7.2017, support services to agriculture, forestry, fishing and animal husbandry are classified under

heading 9986 of the GST Tariff. The Central Government has issued a Notification No.11/2017 – Central Tax (Rate) dated 28.6.2017, thereby specifying effective rates of GST for various services. At serial No.24 of the table to the above notification, support services to agriculture, forestry, fishing and animal husbandry are specified; and a nil rate of tax is prescribed by the Central Government in respect of CGST as well as IGST. No condition is laid down for nil rate of tax for these services. This notification has been brought into force with effect from 1.7.2017 is still in force.

8. By virtue of the Explanation under serial No.24 of the notification, the Government has explained as to what are the support services qualifying for nil rate of tax. The term “agricultural produce” is also explained by virtue of paragraph 4(vii) of the notification. It is the case of the petitioners that since any produce out of rearing of any life form of animals is considered to be an agricultural produce for the notification, milk is an agricultural produce for the purpose of this notification, inasmuch as milk is a produce out of rearing of animals like cows and buffalos. Since packing as well as storage of agricultural produce is considered to be support service to agriculture for the purpose of this notification, chilling and packing of agricultural produce like milk are support services to agriculture, and hence chargeable to nil rate of tax. Accordingly, the contractors of the dairies, that is, petitioners No.2 to 5 herein had not been discharging liability of GST on chilling and packing services for milk. However, for any other services, that is, other than the chilling and packing of milk, the levy of GST is discharged by the contractors at appropriate leviable rates.

9. Though the Federation had received a legal opinion that GST was not chargeable on milk chilling and packing charges, the Federation being an apex body of various dairies located all over the State, and the interest of such farmers and agriculturists co-operative societies being the prime concern of the Federation, a letter dated 1.8.2018 was submitted by the Federation before the Government of India seeking confirmation about rate of GST being nil for milk, chilling and packing services.

10. In reply thereto, Circular F No.354/292/2018-TRU dated 9.8.2018, has been issued by the Government of India through its Tax Research Unit whereby it is clarified that chilling and packing of milk is not exempted from GST. It is also clarified that services by way of job work in relation to all food and food products falling under chapters 1 to 22 attract GST at the rate of 5% and accordingly, the activity of chilling and packing of milk by the job workers attract GST at the rate of 5%.

11. It is the case of the petitioners that there are several contractors with whom agreements are made by the dairies for operating and maintaining milk chilling centers in the State and also in other States. All such contractors supply the same services, that is, chilling and storing of milk, and packing of milk in pouch. Since all the dairies, namely, the member Unions of the Federation are selling and supplying milk all over the country and since their activities are not confined only within the State of Gujarat, chilling centers are kept and maintained at various places in the country, and milk belonging to the dairies is stored in a chilled condition and then packed, as required by the dairies at all such chilling

centers.

12. Since the Government of India through TRU has clarified that milk chilling and packing was not an exempt service, the Federation has informed the dairies about this clarification; and accordingly, the dairies have been discharging the burden of GST on milk chilling and packing services rendered by all contractors. Since GST is an indirect tax and the contractors of the dairies are not to be saddled with liability and burden of such indirect tax for the above services supplied by them to the dairies, the contractors have been depositing GST with the Government on milk chilling and packing charges invoiced and collected from them from the dairies, and in turn the dairies have been reimbursing the contractors with the amount of GST so deposited by them with the Government in addition to payment of milk chilling and packing charges. It is thus the dairies, that is, the petitioners No.2 to 5 herein, who have been bearing burden of GST on milk chilling and packing service supplied to them by the contractors. In addition to the regular payment of GST being made after the above referred circular and clarification by the Government of India, the dairies have also reimbursed the contractors with the entire amount of GST recoverable on milk chilling and packing services supplied by them for the period prior to the above referred clarification by the Government of India. A substantial financial burden for such past supplies is borne and discharged by the dairies, and GST burden at the rate of 5% is being discharged regularly for the period after clarification of the Government also.

13. It is the case of the petitioners that the Central Government has granted exemption to milk chilling, storage

and packing service by virtue of serial No.24 of Notification No.11/2017 dated 28.6.2017, but this exemption is now denied to the petitioners by virtue of the Circular F. No.354/292/2018-TRU dated 9.8.2018 issued by the TRU. The petitioners are, therefore, constrained to deposit substantially high amounts as GST for milk chilling and packing charges recovered from them by their contractors. The petitioners have suffered because substantial amount running into several crores of rupees had to be deposited/paid as GST for the period prior to issuance of the above referred circular, and the petitioners are constrained to pay/deposit huge amount running into crores of rupees for similar services regularly provided by the contractors, for chilling, storing and packing milk belonging to the petitioners. Thus, huge financial burden falls on the petitioners, who are obliged to reimburse the contractors with GST deposited by them with the Government on milk chilling and packaging services supplied to the petitioners for their milk. According to petitioners, these liabilities are not only contrary to the exemption allowed by the Government, but it is also against the objective of the Government of not imposing taxes on a product like milk and on activities of farmers and agriculturist co-operative Societies. It is in these circumstances, that the petitioners have approached this court seeking the reliefs noted herein above.

14. The respondents have filed an affidavit-in-reply in response to the averments made in the memorandum of petition, wherein a reference has been made to serial No.24 of Notification No.11/2017 – Central Tax (Rate) and it is stated that chilling of milk is usually not done by a cultivator or producer of milk nor is it carried out for making it marketable

in the primary market. Chilling takes place in chilling plants and is carried out as part of the process for making milk ready for sale in the secondary and tertiary market. The farmer or agriculturist who produces milk does not sell chilled milk in the primary market. Thus, it is clear that chilled milk is not an agricultural produce therefore, packing of chilled milk cannot be called as packing of agricultural produce.

14.1 It is further stated that the issue of GST rate on packing of processed milk was discussed in the 22nd meeting of the GST Council and the Council recommended a rate of 5% on job work services in relation to food and food products falling under Chapters 1 to 22 of HS Code to cover such process vide para 24.3(i) of the Minutes of the 22nd GST Council Meeting held on 6th October 2017. Thus, chilling and packing of such chilled milk is not exempt from GST. Services by way of job work in relation to all food and food products falling under Chapters 1 to 22 attract levy of GST @ 5 % vide Serial No.26(i) (f) of Notification No.11/2017-Central Tax (Rate) dated 28.6.2017 as amended vide Notification No.31/2017-Central Tax (Rate) dated 13th October 2017. Accordingly, the activity of chilling and packaging of such chilled milk provided by way of job work attracts levy of GST @5%. Therefore, the petitioners' claim that such services are exempt from GST is not legally and factually correct. It is further averred that the circular or clarification issued by TRU is not contrary to any legal position or GST Act or the notifications issued thereunder. Further, by setting aside the impugned circular of TRU, the petitioners or their job workers cannot escape or be exempted from payment of GST on such services as the liability to pay GST on such services provided by their job workers/contractors are imposed

by virtue of serial No.26(i)(f) of Notification No.11/2017-Central Tax (Rate) dated 28.6.2017 as amended vide Notification No.31/2017-Central Tax (Rate) dated 13.10.2017 on the recommendation of the GST Council. It is further submitted in the affidavit-in-reply that the petitioners have not challenged the validity of Serial No.26(i)(f) of Notification No.11/2017-Central Tax (Rate) dated 28.6.2017 as amended vide Notification No.31/2017-Central Tax (Rate) dated 13.10.2017; and that the farmer or agriculturist who produces milk does not sell chilled milk in the primary market.

15. Mr. Paresh Dave, learned advocate for the petitioners submitted that "support services" to agriculture, forestry, fishing and animal husbandry are chargeable to nil rate of duty by virtue of serial No.24 of the Table to Notification No.11/2017-Central Tax (Rate) dated 28.6.2017. "Support services" are explained under Serial No.24 to mean inter alia 'services relating to cultivation of plants and rearing of all life forms of animals, except the rearing of horses, for food, fibre, fuel, raw material or other similar products or agricultural produce'. Several services are specified under clauses (a) to (g) under the Explanation; and clause (e) *inter alia* covers 'packing, storage or warehousing of agricultural produce'. It was submitted that admittedly chilling is a support service by way of storage of milk. Even packing of milk is also specified as a support service. Thus, the expressions "packing" and "storage" under clause (e) of the Explanation under Serial No.24 of the Table to the notification cover chilling and packing of milk in tetra packs or plastic pouches.

15.1 It was further submitted that chilling and packaging of

milk are processes which are undertaken after milk is produced. It was submitted that under para 4 (vii) of the notification, 'agricultural produce' is explained to mean any produce out of cultivation of plants and rearing of all life forms of animals, except the rearing of horses, for food, fibre, fuel, raw material or other similar products on which either no further processing is done or such processing is done as is usually done by a cultivator or producer which does not alter its essential characteristics but makes it marketable for primary market. It was contended that by milk chilling process or even by packing of milk in plastic pouches, tetra packs or the like, the essential characteristics of milk do not get altered, but such agricultural produce only becomes marketable. It was submitted that a harmonious reading of relevant portions and clauses of Serial No.24 of the above notification would mean that services relating to rearing of all life forms of animals for food, or agricultural produce are "support services to agriculture", and packing as well as storage of agricultural produce is also considered to be support services to agriculture. Hence, any produce out of rearing of any life form of animals is considered to be an agricultural produce for the purpose of the notification, and therefore milk which is a produce out of rearing of animals like cows, buffalos and the like, is also an agricultural produce; and packing as well as storage of such agricultural produce (that is, milk) are support services to agriculture. It was urged that such services are fully exempt from recovery of GST, and the impugned circular which takes a contrary view is therefore liable to be set aside.

15.2 The learned advocate for the petitioners further submitted that chilling is a process for preserving milk, and

when milk chilling is carried out by third parties, it is a support service rendered by such third parties for the milk belonging to dairies. Milk is stored in chilling plants, and thus milk chilling is a support service by way of storage of milk, which is an agricultural produce. Even “packing” of milk (which is an agricultural produce within the meaning of this term under the notification) is also specified as a support service and, therefore, packing services by the contractors, which would include packing in tetra packs or plastic pouches and the like, is also chargeable to nil rate of tax by virtue of Serial No.24 of the above notification. It was argued that considering the scope of exemption under Serial No.24 of the Table to Notification No.11/2017 dated 28.6.2017, milk chilling services and also packing of milk are fully exempt from payment of GST and, therefore, no CGST is chargeable from the petitioners’ contractors or any other person providing such services in relation to milk.

15.3 The learned advocate further submitted that the clarification issued by the TRU is incorrect and erroneous, inasmuch as this clarification is apparently based on a misconception about the scheme of exemption contained at Serial No.24 of Notification No.11/2017 dated 28.6.2017. It was submitted that the impugned TRU clarification proceeds on the basis that chilled and packed milk for retail sale was not covered by the definition of “agricultural produce” as according to the TRU, the processes of chilling and retail packing of milk were usually not done by a cultivator or a producer. It was contended that this may be true, but that would only mean that chilled and packed milk was not “agricultural produce”; whereas the question involved in this

case is not whether chilled and packed milk was “agricultural produce” or not. The question is whether ordinary milk (that is, before it is chilled and packed milk) is “agricultural produce” or not, because the “support services” in the nature of chilling and packing have been provided by third parties for such ordinary milk. It was submitted that unfortunately, this position has not been addressed by the TRU, and the impugned clarification is given as if exemption of “support services” was claimed for chilled and packed milk; although, admittedly, the exemption is claimed for ordinary milk, and the exemption is claimed for “support services” in the nature of chilling (that is storage) and packing. It was accordingly, urged that the petition deserves to be allowed in terms of the reliefs prayed for in the petition.

16. Mr. Viral K. Shah, learned senior standing counsel for the respondents, reiterated the averments made in the affidavit-in-reply as referred to hereinabove. It was submitted that the services availed of by the contractors, are clearly not support services for agricultural produce and hence, vide the communication dated 9.8.2018, the respondents have rightly stated that chilling and packing of milk is not exempt from GST.

17. From the facts and contentions noted herein above, it appears that it is not in dispute that milk is an agricultural produce, it being a produce out of rearing of life forms of animals and for food. The present case relates to raw and unprocessed milk. What is brought to the centres is raw milk in which no further processing has been done and therefore, such milk is an agricultural produce.

18. The chilling and packing services provided by the contractors to the petitioners are in respect of raw milk. As farmers involved in rearing animals for the purpose of milk cannot directly connect to each of the consumers of the supply of milk, such farmers join hands to form a village co-operative society and supply milk to the member unions.

19. Vide Notification No.11/2017 dated 28th June, 2017, services falling under Heading 9986 were exempted from payment of tax under Central Goods and Services Tax Act, 2017, State Goods and Services Tax Acts, 2017, Union Territory Goods and Services Tax Act, 2017 and the Integrated Goods and Services Tax Act, 2017. The services falling under clause (i) of the Heading 9986 are “support services to agriculture, forestry, fishing, animal husbandry”. The Explanation to clause (i), to the extent the same is relevant for the present purpose, reads thus:

Explanation. – ‘Support services to agriculture, forestry, fishing, animal husbandry’ mean.

(i) Services relating to cultivation of plants and rearing of all life forms of animals except the rearing of horses, for food, fibre, fuel, raw material or other similar products or agricultural produce by way of -

(a) xxx

(b) xxx

(c) processes carried out at an agricultural farm including tending, pruning, cutting, harvesting, drying, cleaning, trimming, sun drying, fumigating, curing, sorting, grading, cooling or bulk packaging and such like operations, which do not alter the essential

characteristics of agricultural produce but make it marketable for the primary market.

(d) xxx

(e) loading, unloading, packing, storage or warehousing of agricultural produce.”

20. Note 4 below the notification, to the extent the same is relevant for the present purpose, reads thus:-

“Note 4 – For the purposes of this notification:-

(vii) “agricultural produce” means any produce out of cultivation of plants and rearing of all life forms of animals, except the rearing of horses, for food, fibre, fuel, raw materials or other similar products, on which either no further processing is done or such processing is done as is usually done by a cultivator or producer which does not alter its essential characteristics but makes it marketable for primary market.”

As noted earlier, the above notification was brought into force from 1.7.2017.

21. Since the letter/circular dated 9th August, 2018 issued by the respondent No.2 namely, Tax Research Unit of the Government of India, Ministry of Finance, Department of Revenue, is subject matter of challenge in the petition, it may be germane to refer to the said circular. A perusal of the impugned circular shows that it has been issued in the context of the subject: GST on job work charges for chilling and packing of milk. Paragraphs 3 to 5 of the circular read thus:

“3. Chilled and packed milk for retail sale is not covered

by the definition of 'agricultural produce' as the process of chilling and retail packing of milk are usually not done by a cultivator or producer. This is the reason why separate exemption entry exists for 'transportation of agricultural produce' and for 'transportation of milk [S. Nos.20 and 21 of Notification No.12/2017 – Central Tax (Rate) dated 28.6.2017as refer]. The processes of chilling and packing are not processes carried out at an agricultural farm.

4. Thus, chilling and packing of milk is not exempt from GST. Services by way of job work in relation to all food and food products falling under Chapters 1 to 22 attract levy of GST @ 5% [S. No 26 (i)(f) of Notification No.11/2017-Central Tax (Rate)]. Accordingly, the activity of chilling and packaging of milk provided by way of job work, attracts levy of GST @ 5%.

5. As stated by you, job workers make substantial investment in plant and machinery for chilling and packing of milk. Exempting chilling and packing of milk would block input credit of job workers and increase their costs.”

22. At this juncture it may be germane to refer to clause (i) of Heading 9986 [Serial No.24 of the Table to Notification No.11/2017 dated 28.6.2017] and sub-clause (c) of clause (i) of the Explanation thereto, which read thus:

“(i) Support services to agriculture, forestry, fishing, animal husbandry.

Explanation.- “Support services to agriculture, forestry, fishing, animal husbandry” mean-

(c) processes carried out at an agricultural farm including tending, pruning, cutting, harvesting, drying, cleaning, trimming, sun drying, fumigating, curing, sorting, grading, cooling or bulk packaging and such like operations which do not alter the essential characteristics of agricultural produce but make it only marketable for the primary market."

On a perusal of paragraph 3 of the impugned circular, it is evident that the same is based on sub-clause (c) of clause (i) of the Explanation to clause (i) under Heading 9986, inasmuch as, according to the respondents the process of chilling and packing of milk is not usually done by the cultivator or producer and are not carried out at an agricultural farm.

23. In the opinion of this court, if the petitioners were claiming that the support services to agricultural produce fall under sub-clause (c) of clause (i) of the Explanation, the respondents may have been justified in coming to such conclusion. However, it is the case of the petitioners that the support services are of packing and storage of agricultural produce falling under sub-clause (e) of clause (i) of the Explanation which reads thus: *"(e)loading, unloading, packing, storage or warehousing of agricultural produce"* .

24. In the present case, the agricultural produce in respect of which support services are availed is raw unprocessed milk. It cannot be disputed that for storage of milk it would have to be chilled. Milk cannot be stored without chilling as otherwise it would get spoiled. Therefore, storage of milk would include chilling of milk. Chilling of milk does not alter any of its essential characteristics and it still remains raw milk, and it is

this raw milk which is thereafter packed. Therefore, chilling and storage of raw milk and packing it would clearly fall under sub-clause (e) of clause (i) of the Explanation. Consequently, if the raw milk is only stored and packed, the support services would fall under Heading 9986 of the Table to Notification No.11/2017 – Central Tax (Rate).

25. In the impugned circular, it is the case of the respondents that chilled and packed milk for retail sale is not covered by the definition of agricultural produce. While saying so, what is lost sight of is that support services are not provided to chilled and packed milk, but support services of storage and packing are provide to raw milk which is an agricultural produce. Therefore, the very basic premise on which the respondents have proceeded is fallacious and based on a factually incorrect premise. Another ground stated is that such processes are not carried out at an agricultural farm. This ground is based on a misconception of the nature of services being provided, inasmuch as, it is sub-clause (c) of clause (i) of the Explanation which requires processes to be carried out at an agricultural farm; whereas, sub-clause (e) does not contain any such prescription.

26. According to the respondents, there are separate exemption entries for transportation of agricultural produce and for transportation of milk [Serial No.20 and 21) of Notification No.12/2017 – Central Tax (Rate) dated 28.6.2017]. In this regard, a perusal of Serial No.20 of the said notification indicates that the same relates to services by way of transportation by rail or a vessel from one place in India to another of the goods enumerated thereunder. The present

case does not relate to transportation of goods by rail or by a vessel and hence, reference to the said entry is also misconceived. The entry at Serial No.21 relates to services provided by a goods transport agency, by way of transport in a goods carriage of the goods listed thereunder. The present case relates to providing services of storage and packing and not transportation and hence, no reliance can be placed on the said entry.

27. In the impugned circular, it is also stated that chilling and packing is not exempt from GST inasmuch as services by way of job work in relation to all food and food products falling under Chapters 1 to 22 attract levy of GST @ 5% and therefore, the activity of chilling and packaging of milk provided by way of job work attracts levy of GST @ 5%. In this regard, this court is of the view that the levy of 5% GST on job work on food and food products falling under Chapters 1 to 22 would be attracted if the services provided are not "support services" as contemplated under clause (i) of Heading 9986 at Serial No.24 of the Table to Notification No.11/2017 dated 28.6.2017.

28. In the light of above discussion, the court is of the view that the interpretation given by the respondents to the activities of chilling and packing of milk as contained in the impugned letter/circular dated 9.8.2018 is not in consonance with the provisions contained in Serial No.24 of the Table to Notification No.11/2017 dated 28.6.2017 and, therefore, the impugned letter/circular cannot be sustained.

29. For the foregoing reasons, the petition succeeds and is accordingly allowed. The impugned letter/circular F

No.354/292/2018-TRU dated 9.8.2018 (Annexure-F to the petition) issued by the Government of India, through the Tax Research Unit, New Delhi, is hereby quashed and set aside. It is hereby held that milk chilling and packing service provided by the contractors to the petitioners are exempted by virtue of Serial No.24 of the table to Notification No.11/2017 – Central Tax (Rate) dated 28.6.2017 (Annexure-D to the petition).

30. Insofar as the relief claimed for returning of the amount recovered and collected from the petitioners through their contractors as GST on milk chilling and packaging service, the petitioner may move appropriate application for refund in accordance with law.

31. Rule is made absolute accordingly to the aforesaid extent with no order as to costs.

सत्यमेव जयते (HARSHA DEVANI, J)

THE HIGH COURT
OF GUJARAT (SANGEETA K. VISHEN, J)

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