IN THE HIGH COURT OF ORISSA AT CUTTACK

AFR

TREV No.176 of 2001
AND
STREV No. 75 of 2003, STREV 30 of 2012

TREV No.176 of 2001
Reckitt Benckiser (India) Ltd. .... ***Petitioner***
-versus-
State of Odisha and Others .... ***Opposite Party***

STREV No.75 of 2003
Reckitt Benckiser (India) Ltd. .... ***Petitioner***
-versus-
State of Odisha, represented by the Commissioner of Sales Tax and Others .... ***Opposite Parties***

AND

STREV No.30 of 2012
Reckitt Benckiser (India) Ltd. .... ***Petitioner***
-versus-
State of Odisha, represented by the Commissioner of Sales Tax .... ***Opposite Party***

Advocates, appeared in these cases:

For Petitioner(s) : Mr. B.K. Mahanti, Senior Advocate
Mr. R.K. Patra, Advocate

For Opposite Parties : Mr. Sunil Mishra
Additional Standing Counsel

CORAM:
THE CHIEF JUSTICE
JUSTICE R.K. PATTANAIK

JUDGMENT
12.08.2022

Dr. S. Muralidhar, CJ.

Introduction

1. These three tax revision petitions by Reckitt Benckiser (India) Ltd. raise an identical question of law viz., whether Robinson Barley and Purity Barley manufactured by the Petitioner should be subject to sales of tax under the Orissa Sales Tax Act, 1947 (OST Act) under the entry meant for cereals covered under Entry 16 List C @ 4% or under the residual entry at 12%?

2. While TREV No.176 of 2001 pertains to the period 1990-91, STREV No.75 of 2003 pertains to the period 1991-92 and STREV No.30 of 2012 pertains to the period 2000-01. In each of the assessment orders passed for the aforementioned periods, the Sales Tax Officer (STO) i.e. Assessing Officer (AO) rejected the plea of the Petitioner that the aforementioned products of the Petitioner were nothing but barley as a cereal as mentioned in Entry 25 of List-C in Chapter III of the rate chart appended to the OST Act. The above orders have been confirmed by the Orissa Sales Tax Tribunal ('Tribunal') by rejecting the Petitioner's appeals.

3. It requires to be noted at the outset that there was a batch of six revision petitions filed by the Petitioner including the present three revision petitions. STREV No.75 of 2011 for the period 2001-02; STREV No.56 of 2010 for the period 2002-03; STREV No.55 of

2011 for the period 2004-05 were all disposed of on 20th June, 2022 itself.

Relevant provisions

4. At the outset, it must be observed that the Entry number in the rate chart has been varied by fresh notifications issued from time to time. As per the Rate notification with effect from 1st April, 2001 issued by the competent authority in exercise of its power under Section 5(1) of the OST Act, the particulars of the serial number and the rate of sales tax on which reliance is placed by the Petitioner is given as under:

SI No.	**Description of Goods**	**Rate of tax**
25	Cereals other than wheat, paddy, Rice/broken rice, jowar, suan, gurji, Kangu, Ragi and Maize	4%
189	All other goods	12%

5. The FPOS Notification sets out the products subject to first point sales tax. In the said notification, in Item No.52, cereals have been included as follows:

"52. Cereals i.e. bajra, kodan, barley, kukki."

6. Section 14 of the Central Sales Tax Act, 1956 ('CST Act') is titled 'Goods of special importance in inter-state trade or commerce'. It declares certain goods to be of special importance in inter-state trade and commerce ('declared goods'). Clause (i) of Section 14 of the CST Act reads as under:

> "14. Certain goods to be of special importance in inter-State trade or commerce.

> It is hereby declared that the following goods are of special importance in inter-state trade or commerce:
>
> (i) cereals, that is to say,—
> …
> (x) barley (Hordeum vulgare L.)"

7. Section 15 of the CST Act imposes certain restrictions upon, and conditions regarding imposition of tax on sale or purchase of declared goods by State Legislatures. Section 15 of the CST Act includes a condition that the tax on declared goods shall not exceed 4% and the tax shall not be levied at more than one stage.

8. The Petitioner argues that Robinson Barley is to be properly classified under Entry 25 of List-C in Chapter III of the Rate chart pertaining to 'cereals' which would apply and not the residual Entry 189.

The product

9. Mr. B.K. Mahanti, learned Senior Counsel appearing for the Petitioner has filed elaborate written submissions dated 16th May, 2022, 20th June, 2022 and 4th July, 2022. In all these notes of submissions, the product i.e. Robinsons Barley and Purity Barley have been described elaborately as follows:

> "That barley has been patented to bear the trade mark Robinson's which is known as patented barley and the other packets are purity barley. Robinson's patented barley is fortified with calcium and iron in the following proportions:
>
> Powdered barley – 98.725%
> Calcium Carbonate – 1.25%

Reduced Iron – 0.025%

In order to prepare barley powder, barley grains are de-husked and the de-husked grains are grinded in machines to produce barley powder. Initially the powder is collected in bags and thereafter sealed in tin containers to prevent the same from deterioration/natural decay. Since during the process of grinding there is depletion of calcium and iron in the micro quantities resulting in nutritional loss, some quantity of calcium and iron are added to the barley powder by replenishment. The sole purpose of such replenishment of iron and calcium in micro quantity is to bring the barley powder in its original form. Thus barley does not undergo any chemical treatment. The net effect is that barley powder remains as barley powder in spite of the fortification with iron and calcium by way of replenishment. This patented as Robinson's Barley and sold in sealed containers in the market. In order to preserve and protect the barley powder from natural decay, the same are packed in sealed container as per statutory requirement. The barley-Robinsons' Barley and Purity Barley sold by the Petitioner are essentially barley derived from cereal barley grain."

10. It must be noted that a Division Bench of this Court in ***Satyanarayan Bhandar v. State of Orissa (2007) 5 VST 83 (Ori)*** was dealing with a similar question viz., whether Robinson Barley could be classified under Sl.No.16 (as it was at the relevant time), "Cereals other than wheat, paddy, rice/broken rice, jowar, suan, gurji, kangu, ragi and maize" taxable @ 4% or under the residual entry taxable @ 12%? The question arose in the context of Section

14 of the CST Act, read with Section 12 (4) of the OST Act. In para 3 of the judgment, the facts are set out as under:

> "M/s. Satyanarayan Bhandar, the petitioner in both the cases, is a registered partnership firm and carries on business in grocery, stationery, manohary goods, ayurvedic medicines, pan masala and salt, etc. The petitioner is a registered dealer. The assessment of the petitioner-firm was made under Section 12(4) of the Orissa Sales Tax Act, 1947 (hereinafter, referred to as "the OST Act") for the years 1990-91 and 1991-92. After completion of assessments and on the basis of information that the turnover of the petitioner for the aforesaid years has escaped assessment in view of the wrongful grant of exemption, orders for reopening of assessments were passed by the concerned Sales Tax Officer under Section 12(8) of the OST Act."

11. It was claimed by the Assessee in that case that the purchase of Robinson Barley was made inside the State of Odisha on payment of tax @ 4%. While in the original assessment, the exemption was allowed, on reassessment, the STO held that "Robinson Barley is not a medicine nor it is a cereal and is exigible to tax at last point of sale at the rate of 12%." The appeal filed by the Assessee in that case was allowed accepting the Assessee's contention that Robinson Barley was barley which was a 'cereal' taxed at first point of sale @ 4%. However, the Tribunal allowed the appeal of the State holding that Robinson Barley was not the same as barley in the form of cereal and cannot be taxed at the first point of sale at 4%. It is against the above judgment of the Tribunal that the aforementioned two revision petitions were filed which were decided in favour of the State and against the Assessee.

12. In ***Satyanarayan Bhandar*** *(supra),* it was observed "admittedly, Robinson Barley is a processed commodity and is an item which comes through various process of chemical treatment and is fortified with iron and calcium." This Court accordingly held that the decision in ***M.N. Nilugal v. District Manager, Food Corporation of India (2005) 142 STC 229 (Karn.); Deputy Commissioner of Sales Tax (Law), Ernakulam v. Pio Food Packers [1980] 46 STC 63 (SC)*** did not help the case of the Petitioner since "Robinson Barely is regarded as a new commodity in the market and the same is different from the original commodity, namely, Barley".

13. This Court in ***Satyanarayan Bhandar*** *(supra)* also distinguished the decision in ***Alladi Venkateswarlu v. Government of Andhra Pradesh (1978) 41 STC 394*** where the question was whether parched and puffed rice were in fact rice within the meaning of Entry 66 (b) of the First Schedule to the Andhra Pradesh General Sales Tax Act, 1957. This Court in ***Satyanarayan Bhandar*** *(supra)* pointed out that in ***Alladi Venkateswarlu*** *(supra),* the Supreme Court held that rice as ordinarily understood in the English language would include both parched and puffed rice , "but in the instant case between the barely as a cereal and Robinson Barley as a commercial entity substantial chemical transformation has taken place and it is not in dispute that Robinson Barley is a distinct commercial entity and before it is tinned and sold as Robinson barely, barley is processed and added with iron and

calcium. Therefore, Robinson barley and barley are not the same items."

14. Consequently, even the decision in ***Alladi Venkateswarlu*** *(supra)* was held not to help the case of the Assessee in that case. For the same reason, the decisions in ***Rasoi Products v. Commercial Tax Officer, Shyambazar (1982) 51 STC 248; Ram Bahadur Takkur Takkur Pvt. Ltd. v. Coffee Board, Bangalore (1991) 80 STC 199 (Mad.)***; ***Filterco v. Commissioner of Sales Tax, Madhya Pradesh (1986) 61 STC 318; Commissioner of Sales Tax v. Agarwal and Co. (1983) 52 STC 117; Atlantis (East Limited). v. Addl. 20 Members, Board of Revenue, West Bengal (1975) 36 STC 210 (Cal); Modi Industries Ltd. v. State of Odisha (2005) 141 STC 155 (SC); State of Karnataka v. Sri Lakshmi Coconut Industries (1997) 107 STC 566*** were all held to be inapplicable. While discussing all of the above decisions, this Court in ***Satyanarayan Bhandar*** *(supra)* reiterated that "barley and Robinson barley are not items of the same nature though the basic ingredients of Robinson barley may be barley but when barley is transformed to Robinson barley, it goes through various technical process and various other ingredients like iron and calcium are added."

15. This Court in ***Satyanarayan Bhandar*** (*supra*) also referred to the decision of the Supreme Court in ***Rajasthan Roller Flour Mills v. State of Rajasthan (1994) Supp 1 SCC 413*** which had been cited by the Department. There the Supreme Court held that flour, maida and suji even though derived from wheat are not wheat, and

therefore, they cannot be treated as declared goods under the CST Act.

16. Faced with the above decision of the co-ordinate Bench of this Court in ***Satyanarayan Bhandar*** (*supra*), the attempt of Mr. Mahanti, learned Senior Counsel for the Petitioner, was to first distinguish the applicability of the said judgment by stating that the present case did not arise under Section 14(1)(x) of the CST Act. This Court is unable to agree with the above submission since the question which arose in the context of CST Act read with Section 12 (4) of the OST Act concerned this very product i.e. Robinson Barley. There too it was contended that it was a first point tax paid goods. Specific reference was made by the Court in ***Satyanarayan Bhandar*** (*supra*) to the notification dated 30th June, 1990 issued under Section 5(1) of the OST Act as amended by the Orissa Sales Tax (Amendment) Act, 1990 specifying the rates of sales tax on various goods. In that context, the very entry which is relied upon herein by the Petitioner was referred to, viz., "cereals other than wheat, paddy, rice/broken rice, jowar, suan, gurji, kangu, ragi and maize". It is therefore, futile for the Petitioner to contend that the decision in ***Satyanarayan Bhandar*** (*supra*) cannot be relied upon by the Department in the present case.

17. In view of the above discussion, the Court declines the submission of Mr. Mahanti that this Court must refer to a larger Bench the question of the correctness of the decision in ***Satyanarayan Bhandar*** (*supra*).

18. The next attempt by Mr. Mahanti, learned Senior Counsel was to rely on the following five principles relating to classification:

> "(a) Plain meaning to be given to the taxing provision;
>
> (b) Burden to prove classification in a particular entry is always on the Revenue;
>
> (c) Any ambiguity has to be resolved in favour of the assessee;
>
> (d) Resort to residuary entry is to be taken as a last measure; and
>
> (e) Specify entry will override a general entry."

19. In the present case, as correctly noted in the judgment in ***Satyanarayan Bhandar*** *(supra)*, the words used by the legislature in the delineation of articles are to be understood in the 'trade sense' i.e. the commercial understanding of the terms used and not in their scientific and technical sense. In other words, the Court is required to apply the "common parlance test". In the present case, there can be no doubt that in trade parlance 'Robinson Barley and Purity Barley' would not be simply understood as 'barley'. In other words, they are identifiable, distinct, commercial products different from ordinary 'barley'. If a customer went to a shop and asked for barley, such customer would not be supplied Robinson Barley or Purity Barley. Conversely, if the customer was to ask for Robinson Barley or Purity Barley, then he would not be supplied with plain barley. The distinct commercial product 'Robinson Barley' cannot, as pointed out in ***Satyanarayan Bhandar*** (*supra*) be classified as 'cereal' which is taxable @4% and has to be brought under the

residual entry taxable @ 12%. Consequently, this Court is not impressed with the submission based on the decision of the Supreme Court in ***Dunlop India Ltd. v. Union of India (1976) 2 SCC 241*** that Robinson Barley has to be classified under Entry 25 of the rate notification pertaining to 'cereal' and not be confined to "orphanage of the residuary clause' as contended by Mr. Mahanti.

20. Relying on the decisions in ***Union of India v. Garware Nylons Ltd. (1996) 10 SCC 413***; ***HPL Chemicals v. Commissioner of Central Excise (2006) 5 SCC 208***; ***Voltas Limited v. State of Gujarat (2015) 7 SCC 527,*** Mr. Mahanti contended that the burden of proof was on the taxing authority to demonstrate that a particular class of goods or item is taxable in the manner claimed by the Revenue and that a mere assertion in this regard is of no avail. In the considered view of the Court, the Revenue has discharged the above burden by pointing out the Petitioner's own description of its product as noted hereinbefore. The Petitioner has itself stated that it subjected barley to certain processes by which chemicals were added to strengthen the barley's nutritious content thus making it a distinct commercial product. There is no ambiguity in respect of the classification which requires to be resolved in favour of the Petitioner. Therefore, the reliance on the decision in ***Voltas Limited v. State of Gujurat*** (*supra*) is to no avail.

21. Mr. Mahanti sought to place reliance on the decisions in ***State of Maharashtra v. Bradma of India Ltd. (2005) 2 SCC 669*** and ***CCE v. Woods Craft Products Limited (1995) 3 SCC 454*** to contend that resort can be had to a residuary entry only when by liberal

construction, the specific entry cannot cover the goods in question. Here the issue does not arise after the decision in ***Satyanarayan Bhandar*** (*supra*). The question of having resort to any specific entry by 'liberal construction' does not arise since the product in question is a distinct commercial product different from the plain cereal 'Barley'. Likewise, the reliance placed in the case of ***CTO v. Jalani Enterprises (2011) 4 SCC 386*** is also to no avail. As far as the decision in ***Commissioner, Trade Tax, U.P. v. National Cereal Product (2005) 3 SCC 366*** is concerned, the question there was whether malt was a food grain for the purposes of Section 14 CST Act. Further the question arose in the context of certain notifications, applicable in that case, which contained a definition of 'food grain' which was wider than in Section 14, CST Act. The Court does not consider the above decision in ***Commissioner, Trade Tax, U.P. v. National Cereal Product*** (*supra*) to be helpful to the Petitioner either.

22. The attempt next by Mr. Mahanti was to persuade this Court that the decision of the Supreme Court in ***Rajasthan Roller and Flour Mills*** *(supra)* was itself incorrectly decided. An attempt was made to demonstrate that unlike Section 14 of the CST Act which uses the phrase 'that is to say', Entry 25 of the rate notification is a broader entry which includes all kinds of cereals except certain cereals which are specifically excluded and, therefore, all other cereals would include even 'Robinson Barley' and 'Purity Barley'. It is sought to be contended that in ***Telengana Steels Industries Ltd. v. State of Andhra Pradesh AIR 1994 SC 1831*** a two Judge Bench of the Supreme Court had doubted the correctness of the

decision in ***Rajasthan Roller Flour Mills*** *(supra)*. However, the fact remains that in ***Telengana Steels*** (*supra*), no reference was made to a larger Bench to decide the correctness of ***Rajasthan Roller Flour Mills***. It is not within the purview of this Court to doubt the correctness of ***Rajasthan Roller Flour Mills*** *(supra)* which in its considered view applies to the case at hand. In any event, in view of the Coordinate Bench decision in ***Satyanarayan Bhandar*** *(supra)* which is binding on this Court and which in this Court's view does not require reconsideration, there is no occasion to answer the question framed by this Court in the present case in favour of the Assessee.

23. Accordingly, the question framed is answered in favour of the Department and against the Assessee by holding that Robinson Barley and Purity Barley manufactured by the Petitioner should be taxed under the residual Entry 189 of List C of the Rate Chart appended to the OST Act and not Entry 25 relating to 'cereals'. The revision petitions are hereby dismissed.

(S. Muralidhar)
Chief Justice

(R.K. Pattanaik)
Judge

S.K. Jena/Secy.