Allahabad High Court
The Commissioner, Trade Tax vs Emami Ltd. on 13 November, 2007
Author: B Sapru
Bench: B Sapru
JUDGMENT Bharati Sapru, J.

1. Heard learned standing counsel Sri B.K. Pandey for the revisionist State and Sri S.K. Bagaria, Sri Bharat Ji Agrawal assisted by Sri Piyush Agrawal for the assessee.

2. This revision has been filed by the State against the judgment and order of the tribunal dated 21.10.1999 under Section 11 of the U.P. Trade Tax Act, 1948. The tribunal has by the impugned order held that two products namely Himani Naturally Faircream and Himani Naturally Fair Lotion are to be classified as medicines and therefore be chargeable to tax as "Ayurvedic" medicines and has held that the same are not cosmetics.

3. The State is aggrieved by the judgment and order of the tribunal holding the above two products to be medicines.

4. The facts of the case are as such that the assessee dealer is a limited company having its registered office and manufacturing unit at Kolkatta West Bengal and its sale depot at Kanpur U.P. is registered under the U.P. Trade Tax Act.

5. For the assessment year 1996-97, an assessment order dated 2.2.1999 was passed under Rule 41 (8) of the Trade Tax Rules whereby some of the goods of the assessee namely Himani Boroplus Antiseptic Cream, Himani Gold Turmeric Cream, Himani Navratan Oil and Himani Boroplus Prikly-Heat Powder as well as Himani Naturally Fair Cream and Himani Naturally Fair Lotion were treated as cosmetics.

6. The case of the assessee was that these products do not come within the purview of medicines but ought to be classified as "Ayurvedic" medicines" as the ingredients of these products are mainly "Ayurvedic" ingredients.

7. Feeling aggrieved by the assessment order dated 2.2.1999, the assessee filed an appeal under Section 9 of the Act before the Deputy Commissioner (Appeals). When the assessee filed appeal before the first appellate authority, the assessee filed certain evidences, which were filed in its reply before the assessing authority. The evidences, which were filed in the shape of 13 documents, are detailed hereinbelow:

1. Photocopy of drug licence dated 9.8.1992 showing production wise details of ayurvedic medicines;

2. Certificate as issued by Director of Drug Control, West Bengal, Calcutta certifying Emami Fair Cream and Emami Lotion to be ayurvedic medicines.

3. Extracts from the pages 3 to 132 of Indian Materia Maica, Wealth of India, Indian Drug of India, Vahisajya Ratnawali, Charaksanghita, Ras Tarangiri, Raj Nigantu, Drabyagun, Bhartiya Vanoasdhik, Ayurved Sangra, Bhava Prakash and Sushrat Sanghita.

4. Copy of judgment dated 12.4.1993 in the case of Commissioner Commercial Taxes Tamilnadu holding that Emami Naturally Fair Cream Evam Lotion are ayurvedic medicines.

5. Affidavits and certificates given by 34 physicians associated with medical profession in India.

6. Five clinical test reports;

7. Certificates as given by three Dermatologists.

8. Certificates given by five hospitals and dispensaries.

9. Letters/certificates as given by eleven pharmacists in India.

10. Copy of licence as given by Central Excise Officer;

11. Copies of eight judgments rendered in the case of Central Excise.

12. Copy of judgment in the case of Amrutanjan Ltd. v. Collector, Central Excise (77 ELT 500 SC)

13. Copy of judgment in the case of G.D.L. Pharmaceuticals Ltd. v. Collector, Central Excise 104 STC 164;

However when the first appeal was being heard, the authority concerned placed total reliance on a decision of this Court in the case of Balaji Agency Gorakhpur v. C.S.T. reported in 1994 UPTC 184. The operative portion, which I relied reads thus:

As regards Emami Naturally fair cream, Himani Gold Turmeric Cream and Himani Boroplus Antiseptic Cream, the learned Counsel could not show that the view of the Tribunal that they are merely cosmetics was wrong. He contended that several medicinal herbs etc. are used for preparing these items and they are, therefore, medicines. Every cosmetics usually has some medicinal properties for the care of the skin, teeth, hair etc. and simply because they have some medical properties, they cannot be treated as medicines. Whether a thing is cosmetic or medicine has to depend on its general use and such creams are generally used for skin care and not for treatment of any disease of skin. I, therefore, do not find any force in the contention that the Tribunal was in error in holding these items as cosmetics.

In the said case, it was held that the products of the assessee were not medicines but were cosmetics.

Being aggrieved by the appellate order, the assessee dealer preferred second appeal under Section 10 of the Act before the Trade Tax Tribunal, Kanpur, who passed a common order on 21.10.1999 which

is the impugned order in the present revision. The tribunal has set aside the order of the first appellate authority by holding that the products of the assessee including Himani Naturally Fairness Cream and Himani Naturally Fairness Lotion were medicines and not cosmetics.

8. Being aggrieved by the second appellate order, the State has filed the present revision. The questions of law sought to be referred in the revision are as below:

- Whether Trade Tax Tribunal had properly and correctly applied the test of the uses and common parlance as prevalent in the commercial world while deciding the taxability of the goods in question?

- Whether Trade Tax Tribunal was legally justified in placing the reliance upon only literature furnished by the dealer in respect of the goods in question?

The other question was raised for reference by way of amendment application, which reads as under:

- Whether Trade Tax Tribunal was legally justified in holding the taxability of Emami Naturally Fair Cream/Lotion as a medicine?

9. Learned standing counsel Sri B.K. Pandey has argued that the word 'medicine' and 'cosmetic' have not been defined under the Trade Tax Act and therefore while classifying the products into either of the groups, the use of the products in common parlance has to be accepted for charging of the tax.

10. In support of his argument, the learned standing counsel has cited four decisions, which are as under:

1. Paras Pharmaceuticals v. Commissioner of Trade Tax reported in 2007 UPTC 971;

2. Commissioner of Trade Tax v. Singhal Brothers reported in 2006 NTN (vol. 29) 71;

3. Balaji Agency Gorakhpur v. Commissioner of Trade Tax reported in 1994 UPTC 184;

4. Baijnath Ayurvedic Bhawan Pvt. Ltd. v. Commissioner of Trade Tax, reported in 2004 NTN (vol. 24) 436;

11. The argument of learned Standing counsel Sri B.K. Pandey is that the medicine is something which is sold in the market under prescription or is a product which is used to cure and heal the human body. On the other hand, cosmetics are used quite differently and is used only for the purpose of embellishing and improving the external appearance.

12. He has argued that the tribunal has wrongly come to the conclusion that the products i.e. Naturally Fair Cream and Naturally Fair Lotion have wrongly been classified as medicines by the tribunal in the impugned order.

13. In contra, the learned Counsel for the assessee has very strenuously argued that the question whether the product is a cosmetic or medicine is a matter of classification, which can only be decided on the basis of the evidence which is before the authority. He has also argued that the assessee in fact led the entire evidence to show that the products were medicines firstly in reply submitted before the assessing authority and secondly also before the first appellate authority. He has further argued that as many as 13 documents of evidences were adduced before the assessing authority. He has next argued that the assessee had placed before the assessing authority as well as the first appellate authority a copy of the drug licence issued to the assessee under Drugs and Cosmetics Act for the preparation and production of the items in question. He argued that by the above evidence, it was established that the products were medicines as the evidence was given from very conceivable quarter. The evidence so given has not been disputed by any of the authorities at any stage but rather the evidence produced before the authority was accepted at every stage. He further argued that the revenue led no evidence of any sort to rebut the evidence led by the assessee. He further argued that the burden of showing correct clarification lies alone on the revenue but the revenue failed to discharge this burden.

14. In order to substantiate this argument, learned Counsel for the assessee has relied on three decisions of Hon'ble Supreme Court namely Puma Ayurvedic Herbal (P) Ltd. v. Commissioner of C.E. and has relied on para 19 and 20 of this decision.

19. The word "medicament" is not defined anywhere while the word "cosmetic" is defined in the Dugs and Cosmetics Act, 1940 as under:

3.(aaa) 'cosmetic' means any article intended to be rubbed, poured, sprinkled or sprayed on, or introduced into, or otherwise applied to, the human body or any part thereof for cleansing, beautifying, promoting attractiveness, or altering the appearance, and includes any article intended for use as a component of cosmetic.

20. It will be seen from the above definition of "cosmetic" that the cosmetic products are meant to improve appearance of a person, that is, they enhance beauty, whereas a medicinal product or a medicament is meant to treat some medical condition. It may happen that while treating a particular medical problem, after the problem is cured, the appearance of the person concerned may improve. What is to be seen is the primary use of the product. To illustrate, a particular Ayurvedic product may be used for treating baldness. Baldness is a medical problem. By use of the product if a person is able to grow hair on his head, his ailment of baldness is cured and the person's appearance may improve. The product used for the purpose cannot be described as cosmetic simply because it has ultimately led to improvement in the appearance of the person. The primary role of the product was to grow hair on his head and cure his baldness.

The other decision as relied upon by the learned Counsel for the assessee is that the case of the Naturalle Health Products (P) Ltd. v. Collector of Central Excise and the third decision of Dabar India Ltd. v. Commissioner of Central Excise Jamshedpur .

15. I have heard learned Counsel for both sides at length and have perused the record as well as the two appellate orders.

The first appellate order dated 31.3.1999 has recorded that the assessee had produced evidence to establish that it was an ayurvedic medicine and has in fact noted 13 set of evidence produced by the assessee. However the first appellate order contains no discussion with regard to these 13 sets of evidence. In fact the first appellate order does not even discard the evidence as produced by the assessee but has simply relied on the judgment of the Allahabad High Court in the case of Balaji (supra) and has come to the conclusion that the cream which is being used externally cannot be classified as medicine, even though it may have some curative value.

16. The second appellate order, which is the impugned order and in favour of the assessee has drawn conclusion in favour of the assessee. The conclusion as drawn in favour of the assessee classifying the two products i.e. Naturally Fair Cream and Naturally Fair Lotion as medicines, is not recorded on the basis of any reason or after any discussion of the evidences, which were there. The second appellate order simply records that the evidence had been seen. No doubt the evidence may have been seen by the second appellate authority but it has failed to record even a single instance of the appreciation of any of the evidences.

17. The second appellate authority has in one portion of its order recorded that the assessee had a licence under the Drugs and Cosmetics Act to produce these products. However that itself could not be said to be conclusive proof that the product was a medicine and not a cosmetic or vice versa. The holding of a drug licence could at most be a contributory factor and a factor of worthy of consideration but it could not form the sole basis for consideration of classification of items for the purpose of the chargeability of tax. The other conclusions as drawn by the tribunal in the impugned order are also not supported by any discussion or not by any reason for coming to the conclusion reached by it in favour of the assessee that product was ayurvedic medicine and not cosmetic.

18. In so far as the principles of law are concerned in such matters, there was no quarrel. The principles of law are well established. It is well known that the medicines and cosmetics are not defined under the U.P. Trade Tax Act and therefore when a matter of classification arises then necessarily evidence which is produced by either side has to be weighed in order to come to a proper conclusion.

19. For instance, the first finding recorded by the tribunal is that there is substance in the submission made by the assessee with regard to the product being a medicine. This finding is, however, not supported by any reason. The second finding as recorded is in respect of the possession of licence under the Drugs and Cosmetics Act but the finding does not record whether the licence granted was in respect of the items in question. The conclusion is a broad one that the assessee possesses a drug licence. However I may add that earlier it was stated on record the drug licence in favour of the assessee was for all products in dispute including the one issue in this revision.

20. The third finding is that on the basis of earlier decision of this High Court and the literature produced by the assessee but this too is broad conclusion without any specific reason and the last finding has also been made on broad interpretation of the decision of this Court without any specific discussion for classification of the items in dispute as medicine.

21. Having examined the matter at length and having given a due consideration, I am of the opinion that while dealing with the matter of classification of the items, the authority concerned must definitely apply its mind to the issue specifically and should be able to record reasons why it has come to the conclusion that certain items may be classified either as medicines or cosmetics and this too must be done after giving due consideration to the evidences, which have been produced before it.

22. The courts have held more than once that in order to determine the product or cream as medicine, the Twin test' must be followed. That alone can will establish issue. The Twin test are as follows:

I. Whether the item is commonly understood as a medicament which is called the common parlance test. For this test it will have to be seen whether in common parlance, the item is accepted as a medicament. If a product falls in the category of medicament, it will not be an item of common use. A user will use it only for treating a particular ailment and will stop its use after the ailment is cured. The approach of the consumer towards the products us very material. One may buy any of the ordinary soaps available in the market. But if one has a skin problem, he may have to buy a medicated soap. Such a soap will not be an ordinarycosmetic. It will be medicament falling in Chapter 30 of the Traffic Act.

II. Are the ingredients used in the product mentioned in the authoritative textbooks on Ayurveda.

23. The Hon'ble Supreme Court in the case of Puma Ayurvedic Herbal (P) Ltd. (supra) has laid down the method under which the twin test has to be satisfied. Para 7 and 8 of the reports are reproduced below:

7. This opinion coming from a competent and authorized source, is of great relevance so far as the case in hand is concerned. Besides this the evidence produced by the appellant before the authorities in the shape of letters from consumers, from doctors and from Ayurvedic physicians satisfies the common parlance test.

8. On the other hand, the Revenue led no evidence of any sort to rebut the evidence led by the assessee. It is settled law that the burden of showing correct classification lies on the revenue. The Revenue has done precious little in this case to discharge this burden. The Collector (Appeals) further relied on the following evidence in support of his finding that the products in question fall in the category of medicaments:....

24. The evidence has already been led by the assessee in the present case. It is now for the authority concerned to determine the products of the assessee in accordance with the twin test.

25. In this case, the second appellate authority has given no reason in coming to the conclusion it has reached. The evidence is the assessee by giving specific findings and reasons. I therefore remand the matter to the tribunal to apply Twin test' in the case of the assessee also. The tribunal on remand may decide the issue in accordance with law, expeditiously.

With these directions, the revision is disposed of finally.