HIGH COURT OF TRIPURA
AGARTALA

W.P(c) No. 311 of 2015.

CHANDA ENTERPRISE,
Represented by its Proprietor, Smti. Chumki Chanda Majumder, Situated at H.G.B Road, (Overseas Mantion), P.O-Agartala, District-West Tripura, PIN-799001.

----Petitioner(s)

Versus

1. ***The State of Tripura,***
Represented by the Secretary to the Government of Tripura, Finance Department, Agartala, West Tripura.

2. ***The Commissioner of Taxes,***
Government of Tripura, Agartala, West Tripura.

3. ***The Superintendent of Taxes,***
Churaibari Checkpost, North Tripura.

---- Respondent(s)

For Petitioner(s) : Mr. Rajib Saha, Advocate.

For Respondent(s) : Mr. Ashish Nandi, Advocate.

B E F O R E
HON'BLE THE CHIEF JUSTICE MR. SANJAY KAROL
HON'BLE MR. JUSTICE ARINDAM LODH

Date of hearing & Judgment & Order : **22th November, 2018.**

Whether fit for reporting :

Yes	No
√	

JUDGMENT AND ORDER (Oral)

(Sanjay Karol, C.J.)

The core issue which arises for consideration is, as to whether the products sold by the writ petitioner falls within Schedule II(b), Sl. No.45 or Schedule II(a), Sl. No.67 of the Tripura Value Added Tax Act, 2004 (hereinafter referred to as the 'TVAT Act'). Also as to whether as an external aid, definition

clause of the provisions of the Drugs and Cosmetics Act, 1940 (referred to as the Drugs Act) can be relied upon for adjudicating the issues or not.

[2] The petitioner has prayed for following reliefs:

> "(i) Issue Rule NISI;
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> (ii) Issue a Rule calling upon the Respondents and each one of them to show cause as to why a writ of Certiorari and/or in the nature thereof, shall not be issued, cancelling, quashing, setting aside the impugned 'seizure Case No.28/CRB/2015-16, dated 23.07.2015 (Annexure-P/5; supra);
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> (iii) Issue a Rule calling upon the Respondents and each one of them to show cause as to why a Writ of Prohibition and/or in the nature thereof, shall not be passed, prohibiting them to act in further of the seizure Case No.28/CRB/2015-16, dated 23.07.2015 (Annexure-P/5;supra);
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> (iv) In the interim, this Hon'ble High Court may be pleased enough to order for release of the Ayurvedic medicines seized vide seizure Case No.28/CRB/2015-16, dated 23.07.2015;
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> (v) In the interim an order in terms of (i), (ii) & (iii) above;
>
> (vi) After hearing the parties be pleased to make the rule absolute in terms of (i), (ii) & (iii), above;"

[3] Certain facts are not in dispute. Petitioner is not a manufacturer of goods. He is a registered dealer and seller thereof. Goods manufactured outside the State are brought in by him for sale within the State of Tripura. Any goods manufactured or sold within the State of Tripura are also subjected to the incidence of taxation under the provisions of the TVAT Act.

[4] The object and purpose of the TVAT Act is to provide for the levy and collection of Value Added Tax (VAT) at different points of sale within the State of Tripura. The TVAT Act defines what is business; dealer; goods; manufacture; re-sale; sale price; return and taxable sale etc. The incidence of taxation is provided under Section 3 and every dealer is liable to pay the tax on all sales affected by it, subject of course to the exception provided therein. The rates of tax are stipulated under different schedules specified by virtue of Section 7 of the TVAT Act. The burden to prove necessary deduction to which a dealer/a person is entitled to is upon the assessee as is evidently clear from Section 14 of the TVAT Act. It is not in dispute that the rate of tax for the goods specified in Schedule-II(a) is 5% and the rate of tax for the goods specified in Schedule-II(b) is 14.5%. For the sake of elucidation; for adjudication of the lis in issue, we deem it appropriate to reproduce the relevant provisions of the entries specified under the said Schedule as under:

> "Schedule II(a):
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> 67. Medicine and drugs (including Ayurvedic, Siddha, Unani, Spirituous medical drugs and homeopathic drugs) including tonics, food supplements, appetizers, vaccines, syringes, dressing, medicated ointment produced under drug license, light liquid paraffin of IP grade but does not include the products capable of being used as cosmetics and toilet preparations including toothpaste, toothpowder, toilet articles, soaps and hair oil." (emphasis supplied)
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> "Schedule II(b):
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> 45. Cosmetics and toilet articles that is to say,- Talcum powder, prickly heat powder, similar medicated body powder, shampoo of all varieties and forms, hair and body cleaning powder of all kinds, sandal wood oil, ramachom oil, cinnamon oil, perfumes, scents, snow and cream, eau de

> cologne, solid colognes, beauty boxes, face packs, cleansing liquids, moisturizers, make-up articles (not including talcum powder), complexion rouge, bleaching agents, hair oil, hair dyes, hair sprayers, hair removers, hair creams, lipsticks, nail polishes and varnishes, polish removers, eye liners, eye lashes and body deodorants."

[5] Coming to the instant facts, it is also not in dispute that in terms of impugned order dated 23rd July, 2015 (Annexure-P/5), total 118 (87 + 31) packages of goods were seized by the appropriate authority under the TVAT Act as the products were capable of being used as cosmetics and, as such, were to be excluded from Entry No.67. Noticeably, other products also stand seized, but only two items referred to (supra), bearing Serial Nos.24 & 25 of the impugned order are subject matter of challenge in the present writ petition.

[6] Learned counsel, Sri Rajib Saha, while contending that the goods in question are not cosmetic in nature but Ayurvedic medicines, invites our attention to the provisions of the Drugs Act and the licence issued in favour of the manufacturer thereunder, authorizing him to manufacture the goods/products as Ayurvedic medicines as per scheduled books of Ayurveda. Further, with vehemence he argues that the manufacturer had manufactured the goods in terms of the formula prescribed in the said specified books.

[7] On the other hand, Sri Ashish Nandi, learned counsel appearing on behalf of the respondents, reiterates the averments

made in the counter affidavit pointing out the products to be cosmetic in nature and not Ayurvedic medicine.

[8] It is a settled principle of law that if the provisions of the statute are unambiguously clear then for the purpose of interpretation one need not travel beyond the statute. It is also a settled principle of law that each statute has to be interpreted keeping in view its intent, object and purpose.

[9] In ***Wealth Tax Officer, Calicut Vrs. G. K. Mammed Kayi;*** reported in ***(1981) 3 SCC 23,*** the apex Court observed as under:

> 6. It cannot be disputed that the canon of construction applicable to entries in the three Legislative Lists occurring in a Constitution would be different from the canon of construction that would apply to terms or expressions used in a taxing statute. The subject of an Entry in any legislative list is to demarcate as wide a Legislative field as possible by the use of compendious words or expressions while the rule of construction applicable to a taxing statute must ensure that "the subject is not to be taxed unless the language of the statute clearly imposes the obligation.*****"

[10] Undisputedly, TVAT Act does not define ayurvedic medicine as cosmetics or toiletries. But it also does not state it to mean the one defined under the provisions of the Drugs Act.

[11] Be that as it may, to our mind, language of the Schedule II(a), Entry-67 and Schedule II(b), Entry-45 are unambiguously clear.

[12] Let us see as to what is the product which stands seized from the dealer. To our mind, they are nothing but items which can be used as cosmetics and toiletries, for undisputably as is evident from the tax invoices, they are hair lotion, hair shampoo, hair mask, liquid sindur, face wash, sunscreen lotion, serum, body lotion, soap etc.. Well, all these items as per the principle of common parlance are used as cosmetics and toilet articles.

[13] In ***Commissioner of Central Excise, Nagpur Vrs. Shree Baidyanath Ayurved Bhavan Limited*;** reported in ***(2009) 12 SCC 419,*** the Court has clearly spelt out the twin test which is to be applied to a product for determining as to whether it is cosmetic or medicament as under:

> **46.** ****
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> "…. In order to determine whether a product is a cosmetic or a medicament a twin test has find favour with the courts. The test has approval of this Court also vide CCE v. Richardson Hindustan {(2004) 9 SCC 156}. There is no dispute about this as even the Department accepts that the test is determinative for the issue involved. The tests are:
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> ***I.*** Whether the item is commonly understood as 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

> product is 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 ordinary cosmetic. It will be medicament falling in Chapter 30 of the Tariff Act.
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> ***II.*** Are the ingredients used in the product mentioned in the authoritative textbooks on Ayurveda ?"

In the said decision the Apex Court was examining the issue as to whether 'Dant Manjan Lal' was an Ayurvedic product or not, and after observing as under found it not to be so –

> **49.** The primary object of the Excise Act is to raise revenue for which various products are differently classified in New Tariff Act. Resort should, in the circumstances, be had to popular meaning and understanding attached to such products by those using the product and not to be had to the scientific and technical meaning of the terms and expressions used. The approach of the consumer or user towards the product, thus, assumes significance. What is important to be seen is how the consumer looks at a product and what is his perception in respect of such product. The user's understanding is a strong factor in determination of classification of the products.

In the instant case, we find the facts to be similar, if not identical.

[14] In ***Commissioner of Central Excise, Chennai-IV Vrs. Hindustan Lever Limited*;** reported in ***(2015) 13 SCC 742*** the Apex Court has observed as under:

"**15)** *****

"**22.** Thus, the following guiding principles emerge from the above discussion:

22.1. Firstly, when a product contains pharmaceutical ingredients that have therapeutic or prophylactic or curative properties, the proportion of such ingredients is not invariably decisive. What is of importance is the curative attributes of such ingredients that render the product a medicament and not a cosmetic.

22.2. Secondly, though a product is sold without a prescription of a medical practitioner, it does not lead to the immediate conclusion that all products that are sold over/across the counter are cosmetics. There are several products that are sold over the counter and are yet, medicaments.

22.3. Thirdly, prior to adjudicating upon whether a product is a medicament or not, the courts have to see what the people who actually use the product understand the product to be. If a product's primary function is "care" and not "cure", it is not a medicament. Cosmetic products are used in enhancing or improving a person's appearance or beauty, whereas medicinal products are used to treat or cure some medical condition. A product that is used mainly in curing or treating ailments or diseases and contains curative ingredients even in small quantities, is to be branded as a medicament."

[15] While dealing with the issue as to whether product termed as Soft-serve ice-cream can be said to be an ice-cream manufactured and sold by a retail outlet McDonald, the Apex Court in ***Commissioner of Central Excise, New Delhi Vrs. Connaught Plaza Restaurant Private Limited, New Delhi*;**

reported in ***(2012) 13 SCC 639*** by relying upon in ***Shree Baidyanath Ayurved Bhavan Ltd. V. CCE;*** reported in ***(1996) 9 SCC 402,*** held that the primary object of the Act is to raise revenue and for which purpose various products are differently classified. For interpreting the issue, resort should not be made to the scientific and technical meaning of the terms and expressions used but to their popular meaning, that is to say, the meaning attached to them by those using the product.

[16] In our considered view, whether these articles are manufactured as per ayurvedic preparations under the Drugs Act or not would be immaterial and have no bearing on the case for the language of the TVAT Act itself is clear. We notice that Entry-67 was amended vide notification dated 24th March, 2015 in the following terms:

> "1. Amendment of Schedule II(a):
> Under entry No.67(i) of Schedule II(a), the expressions,
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> "Medicine and drugs including vaccines, ayringes, dressing, medicated ointment produced under drug license, light liquid paraffin of IP grade, Ayurvedic, Homeopathic and Unani medicines" shall be substituted by the following expressions:
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> > "Medicine and drugs (including Ayurvedic, Siddha, Unani, Spirituous medical drugs and homeopathic drugs) including tonics, food supplements, appetizers, vaccines, syringes, dressing, medicated ointment produced under drug license, light liquid paraffin of IP grade but does not include the products capable of being used as cosmetics and toilet preparations including toothpaste, toothpowder, toilet articles, soaps and hair oil."

Prior to the said amendment, all medicines and drugs were subjected to the incidence of taxation at such rates as were

provided under Schedule II(a) but, however, w.e.f. 24th March, 2015, a distinction was brought in and as we read from the amended provisions, all medicines and drugs including Ayurvedic, Siddha, Unani, Spirituous medical drugs and Homeopathic drugs, which were capable of being used as cosmetics and toilet preparations were excluded from such entry.

[17] We are fortified in taking this view for as we notice, in entry No.45 of Schedule II(b) products like shampoo of all varieties and forms; snow and cream; face packs; cleansing liquids; moisturizers; hair oil; hair dyes are specified as cosmetics and toilet articles. It is in this backdrop, by way of subordinate legislation, which is not under challenge, distinction was carried out making all products which could be used as cosmetics and toiletries, notwithstanding the fact as to whether they were drugs or their preparation used as Ayurvedic medicines or drugs, to fall within the separate class of products falling within the purview of Entry No.45 of Schedule II(b) and not Entry No.67 of Schedule II(a).

[18] As we reiterate, at the cost of repetition, manufacture of goods as an Ayurvedic preparation under the Drugs Act would have no bearing whatsoever for the purpose of taxation under the TVAT Act. For the intent, purport, scope and object of both the statutes is distinct and separate. The intent of the later is to levy and collect tax at different points of sale within the State of Tripura and the intent of the former being to regulate the import, manufacture, distribution and sale of drugs and cosmetics.

[19] The Apex Court in ***Commissioner of Central Excise, Nagpur*** (supra) observed as under:

> **"55.** True it is that Section 3(a) of the Drugs and Cosmetics Act, 1940 defines "Ayurvedic, Sidha or Unani Drug" but that definition is not necessary to be imported in New Tariff Act. The definition of one statute having different object, purpose and scheme cannot be applied mechanically to another statute. As stated above, the object of Excise Act is to raise revenue for which various products are differently classified in New Tariff Act."

[20] As such, for all the aforesaid reasons, we find no reason to interfere with the impugned order dated 23.07.2015 passed in Case No.28/CRB/2015-16 by the Superintendent of Taxes, Churaibari Checkpost, North Tripura, subject matter of challenge in the present writ petition filed under Article 226 of the Constitution.

The writ petition accordingly, stands dismissed.

(ARINDAM LODH),J **(SANJAY KAROL),CJ.**

Dipankar