

State of Kerala Vs. India Oxygen Ltd.

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Court : Kerala

Decided On : Oct-05-2002

Reported in : [2003]129STC471(Ker)

Judge : G. Sivarajan and; C.N. Ramachandran Nair, JJ.

Acts : Keral General Sales Tax Act, 1963

Appeal No. : T.R.C. Nos. 193 and 205 of 2000 and 68, 83, 84 and 106 of 2001

Appellant : State of Kerala

Respondent : India Oxygen Ltd.

Advocate for Def. : S.K. Devi,; P.K. Maya Devi,; M. Raj Mohan,;

Advocate for Pet/Ap. : Georgekutty Mathew, Government Pleader

Disposition : Petition allowed

Judgement :

G. Sivarajan, J.

1. These six tax revision cases are filed by the revenue. The respondent-assessee is the same in all the cases, viz., M/s. India Oxygen Ltd., Cochin.

2. Two questions arise for consideration in these cases. One is as to whether 'nitrous oxide' is an item liable to be taxed under entry 71 of the First Schedule to the Kerala General Sales Tax Act (for short, 'the Act'). The other is as to whether hydrogen, argon, argon nitrogen mixture are 'industrial gases' falling under entry 59 of the First Schedule to the Act.

3. The assessee is a dealer in chemicals such as nitrous oxide, hydrogen, argon, argon nitrogen mixture, etc. The assessment year concerned is 1981-82. In the assessment year concerned, the assessee contended that nitrous oxide is not an item specified in any of the entries in the First Schedule to the Act and that it is liable to be taxed only at the general rate as an unclassified item. Similarly it was contended that hydrogen, argon and argon nitrogen mixture are 'industrial gases' falling under entry 59 of the First Schedule to the Act. The assessing authority has taken the view that all the aforesaid items are chemicals falling under entry 71 of the First Schedule to the Act. The first appellate authority allowed the appeal holding that nitrous oxide is an unclassified item taxable at multi-point. It was also held that hydrogen, etc., come under entry 59 of the First Schedule to the Act. This was confirmed by the Tribunal in the appeal filed by the State. Hence these tax revision cases.

4. We have heard the learned Government Pleader for the State as well as the learned counsel for the respondent-assessee. The question is one of rate of tax on nitrous oxide, hydrogen, argon and argon nitrous

mixture dealt with by the assessee. The assessee's claim is that nitrous oxide is an unclassified item taxable at the general rate and the other items are industrial gases falling under entry 59 of the First Schedule to the Act. The assessing authority took the view that all the items fall under entry 71 of the First Schedule to the Act. Both the appellate authorities accepted the claim of the assessee. We have perused the orders of the assessing authority as well as the appellate authorities including the Tribunal. Nitrous oxide which is called nitrogen monoxide is a combination of nitrogen and oxygen. One of the methods to obtain nitrous oxide in large scale is by treating ammonium nitrate, i.e., by decomposition of ammonium nitrate. Hence it is clear that nitrous oxide is a chemical, though in ordinary temperature it remains gaseous. This is the position in the case of hydrogen, argon and argon , mixture also. Going by the composition of these items it has to be held that they are 'chemicals'. However this will not solve the problem since entry 71 of the First Schedule to the Act deals with only chemicals not elsewhere provided in the First Schedule. If these items fall under any other entry in the First Schedule to the Act they can be assessed only under those entries because entry 71 says 'chemical not elsewhere specified in this Schedule'. Thus the task is to find out whether these items fall under any other entry in the First Schedule to the Act. So far as 'nitrous oxide' is concerned none of the authorities including the Tribunal had considered as to whether the said item will fall under any other entry in the First Schedule in case it is found to be a chemical or not. Both the appellate authorities straight away decided that it is an unclassified item. However, both the appellate authorities considered the question whether hydrogen, argon and argon nitrogen mixture would fall under entry 59 of the First Schedule to the Act and held that those items fall under the said entry. This was done only because the assessee contended that they are 'industrial gases' falling under entry 59 of the First Schedule to the Act.

5. Entry 71 of the First Schedule to the KGST Act relates to 'chemicals not elsewhere specified in this Schedule'. The assessing authority has not assigned any specific reasons for bringing all the items under entry 71 of the First Schedule. The first appellate authority noted that it is admitted by the assessing authority itself that nitrous oxide is a gas in ordinary temperature and generally used as an anaesthetic agent. The appellate authority further noted that there is no dispute that the sales are made to hospitals and nursing homes for use as anaesthetic agent. The appellate authority in the above circumstances held that nitrous oxide cannot be treated as a chemical or as an industrial gas. The Tribunal also observed that nitrous oxide is a colourless gas used by doctors and dentists to make patients insensitive to pain.

6. We, thus find that nitrous oxide is a gaseous substance sold to hospitals and nursing homes for use as an anaesthetic agent. There is a specific entry 74 in the First Schedule regarding 'medicine'. Applying the user test or the functional test, prima facie, it would appear that this item will fall under the said entry. However, in these cases the Tribunal has entered a finding that nitrous oxide is not a chemical falling under entry 71 and therefore it is liable to be assessed at the general rate as an unclassified item. According to us the Appellate Tribunal ought to have addressed itself to the question as to whether nitrous oxide will fall under any of the other entries mentioned in the First Schedule before taking the view that it is an unclassified item. Instead, the Tribunal has straight away come to the conclusion that 'nitrous oxide' is an unclassified item taxable at the general rate. We are unable to accept the said finding of the Tribunal. The matter requires to be considered by the Tribunal as to whether nitrous oxide will fall under any other entry in the First Schedule to the Act particularly since we have already noticed entry 74 'medicine' in the First Schedule. But in regard to hydrogen, argon, argon nitrogen mixture, both the appellate authorities held that they are gases which are supplied to industries and therefore they are 'industrial gas' falling under entry 59 of the First Schedule to the Act. We are in agreement with the view taken by the Tribunal. We uphold the finding of the Tribunal in that regard. So far as 'nitrous oxide' is concerned we are of the view that the matter must go back to the Tribunal for considering the question whether 'nitrous oxide' will fall under any of the other entries in the First Schedule to the Act. We therefore set aside the order of the Tribunal in respect of nitrous oxide and remit the matter to the Tribunal for consideration whether this item will fall under any of the specific entries in the First Schedule to the Act including 'medicine'. The Tribunal will decide this question afresh with notice and opportunity to the respondent-assessee.

These tax revision cases are allowed to the above extent.

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