State of Gujarat Vs. Pfizer Ltd.

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Court : Gujarat

Decided On : Mar-04-1991

Reported in : [1991]82STC374(Guj)

Judge : G.T. Nanavati and; S.D. Shah, JJ.

Acts : Gujarat Sales Tax Act, 1969 - Sections 62 and 69(2)

Appeal No. : Sales Tax Reference No. 38 of 1980

Appellant : State of Gujarat

Respondent : Pfizer Ltd.

Advocate for Def. : R.D. Pathak, Adv.

Advocate for Pet/Ap. : Kamal M. Mehta, Assistant Government Pleader

Judgement :

G.T. Nanavati, J.

1. In this reference made at the instance of the State, the question which has been referred to us is : whether, on the facts and in the circumstances of this case, the Tribunal was correct in law in holding that the sales of four products in question, namely, (1) T.M. poultry formula; (2) T.M. egg formula; (3) T.M. forte and (4) T.M. 5 would be covered by entry 25 of Schedule I to the Gujarat Sales Tax Act, 1969

and, therefore, they are free all taxes under the said Act, and not by entry 26(1) of Schedule II, Part A to the said Act

2. M/s. Pfizer India Limited (hereinafter referred to as 'the opponent'), a well-known company manufacturing pharmaceuticals in its veterinary and agricultural division, also manufactures products meant for use of cattle and poultry. Out of many products manufactured by it for the use as poultry feed, we are concerned with

(1) T.M. poultry formula,

(2) T.M. egg formula,

(3) T.M. forte, and

(4) T.M.

5. The company sold these products under different invoices in May and October, 1975. It wanted to know the rate of tax payable on the sales of these articles. It, therefore, applied to the Commissioner of Sales Tax under section 62 of the Gujarat Sales Tax Act, 1969, for determination of that question. This application was heard by the Deputy Commissioner of Sales Tax. Before him, the case of the opponent was that as all these products are marketed as poultry-feed and used as such, they are covered by entry 25 of Schedule I to the Act relating to 'poultry-feed' and thus exempt from payment of tax. On consideration of the material produced before him, the Deputy Commissioner held that T.M. poultry formula, as it is mainly used for treating and preventing diseases, cannot be regarded as poultry-feed and would fall under entry 26(1) of Schedule II, Part A pertaining to 'drugs and medicines'. As regards the remaining three products, he held that though they contain terramycin, which is a drug as their 'primary and principal utility is that of a treatment feed given to the poultry for increasing eggs production by supplementary nutrition', they cannot be regarded as drug or medicine. He further held that as the said products contain terramycin, and as terramycin cannot be treated as food, these products cannot be regarded as poultry-feed. Taking this view, he held that these products cannot fall either under entry 25 of Schedule I or entry 26(1) of Schedule II, Part A to the said Act, and therefore, would be covered

by the residuary entry 13 of Schedule III.

3. Against this determination, the opponent filed an appeal to the Gujarat Sales Tax Tribunal. Before the Tribunal also, the opponent raised the same contentions and, in the alternative, contended that if these products were not covered by entry 25 of Schedule I, then they would fall within entry 26(1) of Schedule II, and the Deputy Commissioner was, therefore, in error in holding that T.M. poultry formula was covered by entry 26(1) of Schedule II, Part A and the other three products were covered by entry 13 of Schedule III of the Act. There, it was conceded on behalf of the State that if these products are not to be regarded as poultry-feed, then they would fall within the entry 'drugs and medicines' being entry 26(1) of Schedule II, Part A. The decision of the Deputy Commissioner that T.M. egg formula, T.M. forte and T.M. 5 would fall under entry 13 of Schedule III was not supported by the State before the Tribunal.

4. The Tribunal, after referring to the authoritative literature on the subject, and the pamphlets published by the opponent itself as regards the composition and use of these products, and after applying the test laid down by this Court in Glaxo Laboratories (India) Ltd. v. State of Gujarat [1979] 43 STC 386, held that all these four products would be covered by entry 25 of Schedule I as they can be properly described as poultry-feed. The Tribunal held like this as it was of the view that these four products are in the nature of additives, and they are given to the poultry for supplying nutritional deficiency or preventing nutritional diseases. Taking this view, the Tribunal allowed the appeal.

5. The State, therefore, sought a reference by making an application under section 69(2) of the Act. The Tribunal agreed with the contention of the State that the question of law does arise and has, therefore, referred the abovestated question for the decision of this Court.

6. The learned Assistant Government Pleader submitted that all these four products are basically terramycin preparations and admittedly terramycin is a drug. It is broad-spectrum antibiotic, and is used in treatment and prevention of both systemic and local infections caused by aerobic, anaerobic and gram-positive and gram-negative bacteria, rickettsiae, apirochetes, certain viruses and protozoa. He

submitted that these terramycin preparations, even when they are manufactured with vitamins, minerals or other elements, are given to the poultry with the main object of treating or preventing bacterial diseases. He submitted that such benefits or effects like early laying of eggs, increased production of eggs an rapid and better growth are only indirect effects of the poultry becoming disease free as a result of use of those products. He further submitted that these products, therefore, cannot properly be described as poultry-feed and should be held as drugs or medicines. In support of his submission, the learned Assistant Government Pleader drew our attention to the composition of these products.

7. It cannot be gainsaid that each one of these products contains terramycin. It is also not in dispute, as stated earlier, that terramycin is a drug and it being an antibiotic, is used for preventing or curing diseases. It is, however, now well-settled that the goods which are the subject-matter of taxation must be construed not in any technical sense but as understood in common parlance. The court should not resort to the scientific or technical meaning of the term but should resort to its popular meaning or the meaning which is attached to it in commercial parlance. Therefore, it would be improper to decide the question by merely considering the composition of these products. It will be necessary to consider how these products are marketed by the manufacturer and how they are used by the persons rearing poultry. The literature published by the opponent describes the first two products, viz., T.M. poultry formula and T.M. egg formula as treatment products. Poultry formula is recommended for increasing egg production and to protect flocks against laying slumps which are often caused by the presence of disease-causing organisms and for protection at time of stress, with a view to maintain appetite and normal weight gains and guard against disease. T.M. egg formula is further described as a specially designed antibiotic-vitamin formulation for use in poultry drinking. It is stated that it protects the health of the flock and provides maximum egg production even under stress conditions. This product is thus stated to be helpful in early laying of eggs, production of more eggs and prevention of laying slumps at times of stress or in presence of disease. T.M. forte is described as a specially formulated complete feed supplement for poultry. It is recommended for ensuring balanced nutrition by providing the growth promoter terramycin, plus essential vitamins and major minerals like calcium and phosphorus and trace

minerals, normally not adequately available in poultry-feeds. T.M. 5 is described as blended antibiotic feed supplement containing a guaranteed equivalent of 5 grams oxytetracycline activity per 500 grams. It is stated that it provides (i) increased growth rate, (ii) improved feed efficiency, (iii) improvement in overall animal health, (iv) increases egg production. So far as the use of such products is concerned, we have no other material except what the learned author Dr. S. L. Rajan, Head of Animal Nutrition Division, Indian Veterinary Research Institute, has stated in his book 'Animal Nutrition and Feeding Practice in India'. The learned author has pointed out that poultry-feed can be divided into three categories, viz., (i) roughages, (ii) concentrates and (iii) additives. Additives mentioned by him are (i) vitamin supplements, (ii) mineral supplements and (iii) antibiotics. As regards antibiotics it is stated that since 1950, several antibiotics have become important additives in poultry-feeds became they increase growth rate and efficiency of feed utilization by influencing the bacterial population of the digestive tract, and that antibiotics are not nutrients. The information contained in that book that vitamins, minerals and antibiotics have become important additives in poultry-feeds was not challenged before the Tribunal, nor the veracity of antibiotics have become important additives in poultry-feeds was challenged before the Tribunal, nor the veracity of the same is challenged before us.

8. We can also usefully refer to the decision of this Court in Glaxo Laboratories' case [1979] 43 STC 386, wherein, after referring to the book entitled 'Nutritive Values of Indian Cattle Feeds and the Feedings of Animals', it is observed that in the context of live-stock, which is not intended to be kept in a state of non-production, food consists not only of that constituent which is essential for the maintenance of life but also of the other constituents which provide the energy required for production, be it the production of calf, or milk or output of work and, secondly, that vitamins are considered essential for the proper nutrition of farm stock and they have to be supplied to the animals through their feed. In that case, this Court, after referring to Encyclopaedia Britannica, Volume 9, and McGraw-Hill Encyclopaedia of Science and Technology, Volume 1, further pointed out that the materials on which animals are fed differ widely in chemical composition and nutritive value. For convenience they are divided into two general classes; concentrates and roughages. Concentrates include a large variety of feeds that

have a high value because they are rich in easily digested nutrients, such as starch, fat and protein, and are low in fibre, or woody material, which is not well-digested. Good nutrition is necessary if animals are to be able to maintain health and produce satisfactory amounts of milk, eggs, meat, wool or work. Animals require each day food furnishing sufficient amounts of protein; energy, chiefly supplied by the carbo-hydrates and fat; essential minerals; and vitamins. Deficiency of nutrients and vitamins would make the animals subject to diseases and, therefore, in order to see that the animals are able to maintain health and produce satisfactory amount of milk, eggs, meat, wool or work, they are required to be given sufficient amounts, inter alia, of vitamins. It was further observed that prior to 1949, the principal feed additives used in these mixed feeds were minerals and protein concentrates, but since then there has been enormous expansion in large scale manufacture of vitamins, antibiotics, hormones and essential amino acids, and these substances have been added to mixed feeds as supplements having either direct action on metabolism and growth or indirect action through control of bacterial growth and infection. This Court further observed that such additives are also used for poultry-feed. After referring to the meaning of the word 'poultry' in the ordinary English usage that poultry refers to the rearing of birds for specific purposes, namely, for their meat, eggs, feathers, etc., this Court observed that even with respect to 'poultry-feed' the ration to be supplied to the birds must consist of two constituents, viz., that for maintenance and that for production, that is to say, for growth or fattening and for production of eggs, meat or feathers. This Court then pointed out that in view of the changed circumstances consisting of scientific advancement and rearing of poultry on large commercial scale, poultry-feed is now regarded as something more than food essential for survival. It would consist of feed which is scientifically prepared and which aims at procuring the best yield of meat, eggs and feathers.

9. Thus, it can safely be said that the concept of poultry-feed has changed considerably and it does not mean food for the poultry in conventional sense. It consists not only of concentrates but even additives, like vitamins, minerals and antibiotics have now become a part of it. It is in this context that we have to find out whether the four products manufactured by the opponent can properly be regarded as 'poultry-feed' or not.

10. In view of the well-settled principle that a term in a statute, like Sales Tax Act, should be construed consistently with its meaning in common parlance, or the way it is understood in commercial parlance, and in view of the change in the concept of poultry-feed, the submission of the learned Assistant Government Pleader that these four products should be regarded as drugs and medicines because they contain terramycin, which is admittedly a drug, cannot be accepted. Whether they are poultry-feed or drugs and medicines will have to be decided on the basis of their common or ordinary use. Moreover, as there are two specific entries : one dealing with poultry-feed and another dealing with drugs and medicines, it will be necessary to decide the scope and ambit of each of these entries in such a manner as not to make other entry redundant or ineffective, and then to find out whether these four products can rightly be classified as poultry-feed, as contended by the opponent, or as drugs and medicines, as contended by the State. It was urged by the learned Assistant Government Pleader that even if the test of use is adopted, these four products will have to be classified as drugs and medicines. He tried to draw support for this contention from the decision of this Court in B. Shah & Co. v. State of Gujarat [1971] 28 STC 5. In that case, the question which had arisen for consideration of the Court was, whether 'Nycil medicated powder' was a toilet article within the meaning of entry 21A of Schedule E or was a medicine covered by entry 13 of Schedule C, or was covered by the residuary entry 22 of Schedule E to the Bombay Sales Tax Act, 1959. Considering its property and quality and the recommended use as an article for preventing and curing certain skin diseases, this Court held it to be a medicine and not a toilet article. Relying upon this conclusion of this Court, it was urged by the learned Assistant Government Pleader that if the nature and composition of these four products and the object for which their use is recommended, it would become clear that they are drugs or medicines, as they are essentially drugs really used for curing or preventing bacterial diseases in poultry. Though this Court in that case reached such a conclusion, we cannot, on the basis thereof, hold that the four products with which we are concerned are drugs ora medicines. While arriving at that conclusion, this Court not only applied the well-recognised test of common parlance but also considered the use for which the product was recommended by the manufacturer and for which purpose the consumer was actually using the

same. We, therefore, do not think that that decision can support the contention raised by him.

11. Before we decide whether each of the four products can properly be described as 'poultry-feed', it is also necessary to consider the true scope and ambit of the two rival entries. As against the general entry of drugs and medicines, and medicine which is adapted or specially formulated as animal feed will have to be regarded as falling within the specific entry 'poultry-feed'. It is also well-recognised principle of interpretation that if there is a general entry and a specific entry, then the general entry must give way and in such cases it should be held that the item concerned falls within the specific entry. Therefore, even though an article can generally be described as medicine or drug, if as a result of it being adapted or so formulated as to make it good for a specific purpose, and if there is a specific entry within which such an article can be included, then in that case, it will have to be held that such an adapted article is covered by the specific entry and not by the general entry. Thus, if a drug or a medicine is so adapted so as to make it a preparation or a formulation meant for removing nutritional deficiency in poultry, it may properly be regarded as 'poultry-feed'.

12. If we apply the above test, so far as terramycin poultry formula is concerned, it will have to be held that it would properly fall within the entry dealing with drugs and medicines, and not within the entry dealing with poultry-feed. As pointed out above, it consists of terramycin and its recommended use is medication for the purpose of treating or prevention bacterial diseases in poultry. Its indirect effect on the health of poultry and the indirect help it gives in increasing production of eggs cannot be regarded as its predominant use. Nutrition is not the predominant purpose for which that formula is used by the persons rearing poultry. As regards T.M. forte and T.M. 5 it can be said without any doubt that they are poultry-feed as their main object is to remove nutritional deficiency and are used also for that purpose. So far as T.M. egg formula is concerned, it is a border-line case. Even then, it is not possible to say that it is a drug or a medicine because it contains vitamins and its advertised use and actual use is as a nutritional product. We, therefore, answer the question which is referred to us as follows :

1. T.M. poultry formula being a drug or medicine is covered by entry 26(1) of Schedule II, Part A to the Gujarat Sales Tax Act, 1969.

2. T.M. egg formula, T.M. forte and T.M. 5 can properly be described as poultry-feed and, therefore, they are covered by entry 25 of Schedule I to the Gujarat Sales Tax Act, 1969 and thus they are free from payment of tax on their sales.

13. The question is thus answered in favour of the State so far as T.M. poultry formula is concerned and is answered in favour of the assessee and against the department in so far as it relates to the other products. There shall be no order to costs in this reference.

14. Reference answered accordingly.