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ALUVA SUGAR AGENCY

v.

STATE OF KERALA

(Civil Appeal No. 7731 of 2011)

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SEPTEMBER 7, 2011

[DR. MUKUNDAKAM SHARMA AND ANIL R. DAVE, JJ.]

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Kerala General Sales Tax Act, 1963: Second Schedule, Entry 17A – Margarine used for preparing bakery products and confectionaries – Taxability @ 4% or 8% – Held: Margarine is used as a substitute for butter and is used in preparation of food articles specially for preparing bakery products and also used in confectionary industry – For manufacturing margarine, refined and/or hydrogenated oils of sun-flower, soyabean, cotton seed, palmoline, palm and sesame are used – Like butter, margarine also contains almost 80% fat and remaining constituents of margarine are edible things which are added thereto by the manufacturer of margarine – According to Entry 90 in the First Schedule to the Kerala General Sales Tax Act, 1963, oils, whether edible or inedible, including refined or hydrogenated oils and margarine, not elsewhere mentioned is to be taxed at 8% – Concessional rate of 4% is levied on all edible oils as per Entry 17A of the Second Schedule read with Notification SRO No. 429/95 dated 31.2.1995 – Circular 2439/TD dated 19.2.1996 made it clear that edible oil like refined or hydrogenated oil such as groundnut oil, gingelly oil, refined and vanaspathi oils are to be taxed @ 4% and not at @ 8% – Edible oil is that oil which can be used for human consumption – It is not necessary that all edible things should be consumed in the form in which they are available – Though one may not consume margarine directly or may not use for normal cooking, the fact is that margarine is used for preparing bakery items which are consumed by human

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beings and, therefore, margarine is also edible and is eligible to benefit of rate of tax of 4% – Sales Tax – Notification SRO No. 429/95 dated 31.2.1995, Second Schedule, Entry 17A – Circular 2439/TD dated 19.2.1996.

The question which arose for consideration in the instant appeal was whether margarine used by appellant for preparing bakery products can be treated as edible oil and thus, the appellant is entitled to the benefit concessional of rate of tax of 4% as provided in Entry 17A of the second schedule of the Kerala General Sales Tax Act, 1963 read with Government Notification SRO No. 1725/93 and 429/95. The Department's case was that margarine would come under Entry 90 and, therefore, is taxable @ 8% and not at concessional rate of 4%.

Allowing the appeal, the Court

HELD: 1. Margarine is a generic term and it is used as a substitute for butter. It is used in preparation of food articles and specially used for preparing bakery products. For the purpose of manufacturing margarine, refined and/or hydrogenated oils of sun-flower, soyabean, cotton seed, palmoline, palm and sesame oils are used. Vegetable oils, salt, permitted emulsifiers and stabilizers are also used for manufacturing margarine. Margarine contains all edible things and is used exclusively as a raw-material for preparing bakery products and is also used in confectionary industry. Like butter, margarine also contains almost 80% fat and remaining constituents of margarine are edible things which are added thereto by the manufactures of margarine. As it is used for making eatables, margarine is also edible though it is not used for normal cooking as other oils like coconut, sunflower, soyabean, sesame oils are used but it can not be disputed that it is an edible oil. [Paras 14, 15] [214-G-H; 215-A-D]

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A 2. According to Entry 90 in the First Schedule of the
Kerala General Sales Tax Act, oils, whether edible or
inedible, including refined or hydrogenated oils and
margarine, not elsewhere mentioned is to be taxed at 8%.
Concessional rate of 4% is levied on all edible oils as
B per Entry 17A of the Second Schedule read with
Notification SRO No. 429/95 dated 31.2.1995. Thus,
instead of 8%, edible oil is taxed at the rate of 4%.
Margarine is definitely an edible oil as it is used for
preparing bakery products but it is not used for normal
C cooking. As margarine is not used for normal cooking
but is still used for preparing bakery products, a doubt
prevailed whether margarine can be considered as edible
oil. By virtue of the circular 2439/TD dated 19.2.1996, it
was clarified that the term "edible oil" mentioned in the
D Notification SRO 429/95 dated 31.3.1995 included refined
or hydrogenated oil such as groundnut oil, gingelly oil,
refined oil and vanaspathi. The circular made it clear that
edible oil like refined or hydrogenated oil such as
groundnut oil, gingelly oil, refined and vanaspathi oils are
E to be taxed @ 4% and not at @8%. The definition of
"edible oil" given in the circular was not dealing
exhaustively with all edible oils. It merely illustrated
some of the oils which are edible oils. It means that the
definition of the term "edible oil" in the circular is not
F exhaustive but is illustrative. This circular did not say
that only edible oils referred to in the said circular would
be taxed @ 4%. Edible oil is that oil which can be used
for human consumption. It is not necessary that all edible
things should be consumed in the form in which they are
available. There are number of ingredients used in
G cooking for preparation of food articles which are not
consumed in the same form but they are used in
preparation of food articles which are consumed.
Normally anything which is used for preparation of a food
article is edible because ultimately it is being consumed
H by human beings. Though one may not consume

margarine directly or may not use for normal cooking, the fact is that margarine is used for preparing bakery items which are consumed by human beings and, therefore, margarine is also edible. Having around 80% fat, and being in the nature of oil, it should be considered as edible oil. Upon perusal of the Circular dated 19th February, 1996, explaining the term "edible oil", the intention of the government was to give relief in tax to edible oils. The conclusion arrived at by the Tribunal to the effect that margarine is an edible oil is correct and, therefore, the appellant is entitled to benefit of reduced rate of 4%. [Paras 17-22] [216-C-E; 217-C-H; 218-A-E]

Commissioner of Trade Tax, UP v. Associated Distributors 2008 (7)SCC 409: 2008 (7) SCR 695 – referred to.

Case Law Reference:

2008 (7) SCR 695 Referred to. Para 11

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 7731 of 2011.

From the Judgment & Order dated 22.9.2006 of the High Court of Kerala at Ernakulam in S.T.R. No. 569 of 2004.

Subramonium Prasad for the Appellant.

Yashbant Das, S. Geetha, R. Satish for the Respondent.

The Judgment of the Court was delivered by

ANIL R. DAVE, J. 1. Leave granted.

2. Being aggrieved by the judgement and order dated 22nd September, 2006, delivered in S.T.R. NO. 569 OF 2004 by the High Court of Kerala at Ernakulam, the appellant has filed this appeal.

3. The short question which arises for consideration in this

A appeal is whether sale of margarine is to be taxed at 8% or 4% under the provisions of Kerala General Sales Tax Act, 1963 (hereinafter referred to as "the Act").

B 4. The Sales Tax Officer held that margarine is a lubricant and animal fat, which is used for making bakery products, and is neither edible nor inedible oil. According to him, edible oil is defined in circular no.2439/96/TD dated 19.2.96, where it is stated that edible oil includes refined or hydrogenated oil such as ground nut oil, refined oil and vanaspathi and, therefore, he held that margarine is not edible. As margarine is not consumed directly, according to him, it is inedible oil. Entry 90 in the First Schedule specifically uses the phrase "and margarine" which establishes the fact that the same is neither edible nor inedible oil. Hence, margarine would come only under Entry 90 and, therefore, would be taxable at the rate of 8% and not at the concessional rate of 4%. Hence, the sale of margarine would be subjected to tax at 8%.

E 5. The appellant preferred an appeal before the Appellate Assistant Commissioner, Commercial Taxes, Ernakulam. The appeal was dismissed and the order of the Sales Tax Officer was upheld. Aggrieved by the above order, the appellant preferred an appeal against the said order before the Kerala Sales Tax Appellate Tribunal. The Tribunal set aside the order of the Appellate Assistant Commissioner in so far as it related to the rate of tax on margarine. According to the Tribunal:

G ".....margarine could be considered as "edible oil". According to New Webster's Dictionary, margarine is "a substitute for butter consisting of a mixture of prepared edible fats extracted from vegetable oils, and treated with lactic acid bacilli". According to Chambers Twentieth Century Dictionary, margarine is "any imitation butter". According to Concise Oxford Dictionary, margarine is "butter substitute made from edible oils and animal fats with milk". Thus, margarine is considered as a substitute for butter".

The Tribunal further held that by virtue of Circular No. 2439/83/96/TD dated 19.2.1996, the Government had clarified the doubt as to whether hydrogenated edible oil like vanaspathi oil would come within the ambit of edible oil. In the words of the Tribunal "The Government clarified that the expression edible oil would include hydrogenated oil such as groundnut oil, gingely oil, refined oil and vanaspathi. But this does not mean that margarine cannot be considered as edible oil. Further it is to be noted that the expression used in the above Government notification is "such as" and hence, it is not an exhaustive list. It is only illustrative. In any case, it is pertinent to note that margarine has been classified in Entry 90 (as extracted in para 2 above) which relates to oils. Hence, the intention of the legislature is to treat margarine as oil. Thus, the authorities below cannot take the stand that margarine is not oil. Considering all the above facts, we are of the view that margarine could be considered as edible oil. Since margarine is edible oil, the appellant is entitled to the benefit of the reduced rate of tax of 4 % as provided in Entry 17A of the Second Schedule of the Government notification S.R.O. No. 1725/93".

6. Against the order of the Tribunal, the respondent - State Government filed a revision petition in the High Court of Kerala at Ernakulam. The question raised in the revision petition was whether the Tribunal was justified in granting concessional rate of tax on BISBRI brand of bakery margarine sold by the appellant by treating it as an edible oil under Entry 17A of the Second Schedule as per notification SRO 1728/1993 for the assessment year 1997-98. The High Court in the impugned judgement held that BISBRI brand bakery margarine sold by the appellant cannot be used for all purposes for which edible oils are used. The High Court observed:

".....The product description of Respondent's product in the leaflet further shows that the item is enriched with

A vitamin A and vitamin D and also contains permitted emulsifiers and stabilizers. Even though counsel for the Respondent referred to the leaflet of Dalda produced in court and contended that vitamin addition is there in other hydrogenated oils also, we do not think Dalda sold by hydrogenated oil is similar to bakery margarine sold by the Respondent. From the product description and the limited use of the item in the bakery and confectionary industry, it is clear that the Respondent's product namely, bakery margarine is a product made for a specific purpose i.e. for use in bakery and confectionary industry and the manufacturer has specifically prohibited use of the item for any other purpose. Edible oil, on the other hand, whether in hydrogenated form or not, is used for all cooking purposes. Even though hydrogenated oil or refined oil also can be used in the bakery or confectionary industry, the reverse is not true. In other words, margarine exclusively made to use in bakeries or confectionary industry cannot be treated as edible oil as the same cannot be used for all purposes for which edible oil is used. In fact, the Tribunal has allowed respondent's claim on the ground that the circular clarifying the notification uses the word "such as" and so much so, the list is not exhaustive. However, we find from the circular that the use of words "such as" after including hydrogenated oil is followed by specific items namely ground nut oil, gingili oil and vanaspathi. This only means that those items also are covered by notification. However, margarine referred above is not similar to those items is what we found. Therefore, we are of the view that bakery margarine is not edible oil covered by the notification and clarified in the circular and therefore, the decision of the Tribunal holding otherwise is liable to be reversed".

7. Being aggrieved by the said judgment, this appeal has been filed by the appellant-assessee.

H 8. The learned counsel for the appellant submitted that as

margarine is an edible vegetable oil, it squarely falls in Entry 17A of the Second Schedule of the Act and, therefore, it becomes eligible for concessional rate of tax at 4%. To substantiate this claim, he submitted that there are two types of margarine, namely, table and bakery margarine. The product dealt with by the appellant is bakery margarine. Photocopies of the labels affixed on the container of margarine manufactured by a few companies have been placed on record. The first one is the label of BISBRI bakery margarine. It is stated in the label that the said margarine is made from vegetable oils only and that it is enriched with vitamins A and D and is made from any or all of the following permitted ingredients:

“refined and/or hydrogenated sunflower, soyabean, cottonseed, palmoline, palm and sesame oils, salt, permitted emulsifier and stabilizers”.

9. Similarly, details of some other brands were given so as to substantiate his case that margarine is an edible oil, which is being used in eatables. He further submitted that the margarine used by the appellant does not become inedible oil just because it is meant for preparing bakery products. The question is not the use to which the oil is put but whether the oil is edible. The learned counsel for the appellant also argued that the intention of Entry 17A of the Second Schedule was to confer a concessional rate of tax at 4% for edible oils. Margarine, being hydrogenated oil and also edible, qualifies for the concession.

10. On the other hand, the learned counsel for the respondent contended that the notification SRO 1728/93 granted exemption only to edible oils, whereas Entry 90 of the First Schedule to the Act includes oils, edible or inedible, including refined or hydrogenated oils and margarine. It means that the concession is not granted to margarine as it is included in Entry 90 of the First Schedule. It was argued that as the intention of the legislature is clear, the appellant cannot claim

A the benefit of reduced rate by submitting that its product also comes within the ambit of edible oils. He further submitted that the BISBRI brand margarine sold by the appellant cannot be used for all purposes for which edible oils, including hydrogenated oils and vanaspathi, are used. It was his case
 B that margarine was used for a limited purpose i.e. only for preparing certain eatables and not for all purposes and, therefore, it cannot be said to be edible oil.

11. The learned counsel relied upon a judgment delivered in the case of *Commissioner of Trade Tax, UP v. Associated Distributors*, 2008(7) SCC 409. There the dispute was whether
 C bubble gum was a mithai and could be taxed at 6.25% or whether bubble gum was an unclassified item to be taxed at 10%. This Court held that although bubble gum contained 60% of sucrose, still the same was not a mithai. Relying on the
 D decision of the Apex Court in the aforesaid case, the counsel contended that although margarine may be an edible product and used in bakeries, it cannot fall within the classification of 'edible oil' which is essentially a cooking medium in common parlance.

E 12. We have heard the learned counsel and also perused the records.

13. The main issue for adjudication in this appeal is whether margarine can be treated as edible oil and thus, fall
 F under Entry 17A of the Second Schedule of the said Act.

14. Margarine is a generic term and it is used as a substitute for butter. It is used in preparation of food articles and specially used for preparing bakery products. For the
 G purpose of manufacturing margarine, refined and/or hydrogenated oils of sun-flower, soyabean, cotton seed, palmoline, palm and sesame oils are used. Moreover, vegetable oils, salt, permitted emulsifiers and stabilizers are also used for manufacturing margarine. So far as the
 H margarine manufactured by the appellant is concerned, it is

made only from vegetable oils as stated by the appellant and as borne out from the record. The margarine manufactured by the appellant is exclusively used as raw-material by bakeries and those who manufacture confectionaries. A

15. Looking to the contents of margarine, it is clear that it contains all edible things. Margarine is used exclusively as a raw-material for preparing bakery products and is also used in confectionary industry. Like butter, margarine also contains almost 80% fat and remaining constituents of margarine are edible things which are added thereto by the manufactures of margarine. Vegetable and hydrogenated oils are used in manufacturing margarine and as it is used for making eatables, margarine is also edible though it is not used for normal cooking as other oils like coconut, sunflower, soyabean, sesame oils are used but it can not be disputed that it is an edible oil. C
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16. So far as imposition of tax under the Act is concerned, there are two relevant entries, which are as under:

"First Schedule of KGST Act: E

<u>Sl. No.</u>	<u>Description of goods</u>	<u>Point of levy</u>	<u>Rate of tax</u> (percentage)
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90.	Oils, edible or inedible including refined or hydrogerated oils and margarine not elsewhere mentioned in this Schedule or in the second schedule.	At the point of first sale in the State by a dealer who is liable to tax under Section 5.	8	F G
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A Second Schedule:

<u>Description of goods</u>	<u>Existing rate of tax</u> (percentage)	<u>Reduced rate of tax</u> (percentage)
Edible oil	8	4

17. According to the above Entry 90 in the First Schedule, oils, whether edible or inedible, including refined or hydrogenated oils and margarine, not elsewhere mentioned is to be taxed at 8%. It is pertinent to note that concessional rate of 4% is levied on all edible oils as per Entry 17A of the Second Schedule read with Notification SRO No. 429/95 dated 31.2.1995. Thus, instead of 8%, edible oil is taxed at the rate of 4%. The question is whether the appellant is entitled to the aforesaid benefit for the margarine manufactured by it. Margarine is definitely an edible oil as it is used for preparing bakery products but it is not used for normal cooking. As margarine is not used for normal cooking but is still used for preparing bakery products, a doubt prevailed whether margarine can be considered as edible oil. In the circumstances, Circular No. 2439/TD dated 19.2.1996 was issued by the Government, which reads as under:

"CIRCULAR

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Sub:- Reduced rate of tax on Edible Oil – Clarification – regarding.

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- As per the Entry 90 in the 1st Schedule to the Kerala General Sales Tax Act, Oils, - edible or inedible, including refined or hydrogenated oil and margarine not elsewhere mentioned in the Schedule are taxable @ 8% at the point of 1st sale in the State. As per the notification SRO 429/95 dated 31.3.1995, the rate of tax edible oil is reduced to

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4% with effect from 1.4.1995.

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2. Now certain doubts have been raised as to whether hydrogenated edible oil like vanaspathy will come within the concessional rate. Government, having examined the matter, are pleased to clarify that the term "Edible Oil" mentioned in the notification SRO 429/95 dated 31.3.1995 included refined or hydrogenated oil such as ground nut oil, gingely oil, refined oil and vanaspathi."

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18. By virtue of the aboveresferred circular, it has been clarified that the term "edible oil" mentioned in the Notification SRO 429/95 dated 31.3.1995 includes refined or hydrogenated oil such as groundnut oil, gingely oil, refined oil and vanaspathi. Thus, the term "edible oil" has been explained by virtue of the circular dated 19.12.1996. The afore-stated circular makes it clear that edible oil like refined or hydrogenated oil such as groundnut oil, gingely oil, refined and vanaspathi oils are to be taxed @ 4% and not at @8%. The definition of "edible oil" given in the aforestated circular is not dealing exhaustively with all edible oils. It merely illustrates some of the oils which are edible oils. It means that the definition of the term "edible oil" in the circular is not exhaustive but is illustrative. This circular does not say that only edible oils referred to in the said circular would be taxed @4%.

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19. In the aforestated circumstances, one has to consider whether margarine can be considered as an edible oil. We clearly understand that edible oil is that oil which can be used for human consumption. It is not necessary that all edible things should be consumed in the form in which they are available. There are number of ingredients used in cooking for preparation of food articles which we do not consume in the same form but they are used in preparation of food articles which are consumed.

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20. So as to simplify the conclusion, we may say that

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- A normally anything which is used for preparation of a food article is edible because ultimately it is being consumed by human beings. Though one may not consume margarine directly or may not use for normal cooking, the fact is that margarine is used for preparing bakery items which are consumed by
- B human beings and, therefore, margarine is also edible. Having around 80% fat, and being in the nature of oil, in our opinion, it should be considered as edible oil.

21. Upon perusal of the Circular dated 19th February, 1996, explaining the term "edible oil", we find that intention of the
- C government was to give relief in tax to edible oils. So as to clarify the doubt, it has been specifically stated in the said circular that edible oils would also include hydrogenated oils such as ground nut oil, gingely oil, refined oil and vanaspathi oil. The aforestated circular clarified that hydrogenated edible
- D oil like vanaspathi oil should be treated as edible oil. In our opinion, the Tribunal was right when it came to the conclusion that margarine should be taxed @ 4% as it is edible oil.

22. For the aforestated reasons, we are of the view that
- E the conclusion arrived at by the Tribunal to the effect that margarine is an edible oil is correct and, therefore, the appellant is entitled to benefit of reduced rate of 4%.

23. We, therefore, allow the appeal by quashing the
- F impugned order dated 22.9.2006 passed by the High Court. The appeal, is allowed accordingly with no order as to costs.

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Appeal allowed.