

DEPARTMENT OF COMMERCIAL TAXES, KERALA
PROCEEDINGS OF THE AUTHORITY FOR CLARIFICATION
U/s.94 OF THE KERALA VALUE ADDED TAX ACT, 2003.

Members present are:

1. T.K. Ziavudeen.
*Joint Commissioner (Law),
Office of the Commissioner of Commercial Taxes, Thiruvananthapuram.*

2. Dr. A. Bijikumari Amma.
*Joint Commissioner (A & I),
Office of the Commissioner of Commercial Taxes, Thiruvananthapuram.*

3. N. Thulaseedharan Pillai.
*Joint Commissioner (General),
Office of the Commissioner of Commercial Taxes, Thiruvananthapuram.*

Sub:- KVAT Act, 2003 – Clarification U/s 94 – Rate of tax of certain ayurvedic items – Orders issued.

Read:-1. Clarification Order No.C3/28127/15/CT dtd. 15.04.2016.
2. Judgment of Hon'ble High Court in O.T.(Appeal) No. 17 of 2016, dtd. 20.10.16
3. Application dtd. 19-11-16 from M/s. Himalaya Drug Company, Kochi.

ORDER No.CT/713/17-C3 DATED 19/10/2017

1. M/s. Himalaya Drug Company, Kochi has preferred an application for clarification regarding rate of tax of certain ayurvedic products as per the direction of the Hon'ble High Court of Kerala in OTA No. 17 of 2016 dtd. 20-10-2016. M/s. Vishal Personal Care Pvt. Ltd., Hyderabad had preferred an application dtd. 05.08.15 seeking clarification on the rate of tax of 218 Nos. of commodities including face packs, face washes, gels etc.

2. Accordingly, as per Order No. C3/28127/15 dtd. 15.04.16 it was clarified as follows:

*As such, going by the Rules of Interpretation of Schedules appended to the Kerala Value Added Tax Act, 2003 and the item vi.23 in particular, it can safely be concluded that the Legislature never intended to include **soaps or other products containing added medicaments in Entry 36 in Third Schedule**. The scope of the item vi.23 is not limited to any specific sub-entry viz Entry 36(7) or Entry 36(27); but is applicable to all the sub-entries of Entry 36 of the Third Schedule. Further **preparations of headings 3303 to 3307, even if they have therapeutic or prophylactic properties** are excluded from Chapter 30 of the Customs Tariff Act.*

Hence, it is hereby clarified that the applicant's product falling under the category of gels, face-washes etc. would be taxable at the rate of 14.5% by virtue of Entry 27(2)(b) of S.R.O No. 82/2006 and other products would be taxable at the rate of 5% by virtue of Entry 36(27) of the Third Schedule to the KVAT Act, 2003.

3. Aggrieved by the order, M/s. Himalaya Drug Company filed OT Appeal before the Division Bench of the Hon'ble High Court of Kerala and the Hon'ble Court in OT. Appeal No. 17 of 16 dtd. 20.10.16 had issued a direction to consider the present clarification petition untrammelled by the above mentioned clarification order. The concluding portion of the judgement is extracted below.

As can be noted from what we have stated above, it is clear that what the Authority for Clarification decided on 15.04.2016 at the instance of M/s. Vishal Personal Care Private Ltd., Hyderabad, was only issues relatable to the products of that manufacturer and not in relation to any other person. Obviously therefore, the clarification that was granted at the instance of the said manufacturer would not bind on the appellants or the writ petitioner before us. Therefore, we are inclined to take the view that instead of entertaining the appeal and the writ petition, the appellants and writ petitioner/dealer concerned can move the Authority for Clarification on the basis of the products in relation to which they seek clarification. If such applications are filed either by the appellants or the petitioner herein within a period of three weeks from now, the said matter will be decided by the competent authority, without fail, following due procedure as prescribed in the statute and in accordance with law, within a period of three months from the date of receipt of a copy of this judgment or the institution of the applications as above, whichever is later. It is reiterated that such consideration shall be independent of what has been stated in the order dated 15.04.2016 by the Authority for Clarification as stated above as well as in this judgment. Pending such consideration, no penalty proceedings or assessment proceedings shall be finalised as against the appellants or the writ petitioner/dealer and no demand shall be enforced following assessment, if any, already made. These matters are ordered accordingly.

As per the direction of the Hon'ble High Court, M/s. Himalaya Drug Company has filed an application for clarification on 19.10.16.

4. The applicant has submitted that they are manufacturing and dealing with only those goods after taking proper drug license from the Drugs Controller and Drug licensing authority, Directorate of Ayush, Bangalore. The applicant has enclosed true copy of certificate of renewal of license to manufacture for sale of ayurvedic drugs dtd. 24.02.12 and also the certificate of renewal license to manufacture cosmetics for sale dtd. 02.06.12.

5. The applicant would contend that the entire items manufactured by the company are nothing but only ayurvedic products as evidenced by the drug license certificate. Further, all types of ayurvedic products are coming under Schedule III to the KVAT Rules and hence taxable only @ 5%. The applicant would also contend that no HSN code has been given to the ayurvedic cosmetics as it is a general entry with three specified conditions ie.,

condition No. 1 - the product should be ayurvedic cosmetics,
condition No. 2 - it should contain added medicaments and
condition No. 3 - it should be manufactured under drug License granted under the Drugs and Cosmetics Act 1940.

Thus if these 3 conditions fulfilled, all ayurvedic cosmetics would come under the entry 36(27) of the third schedule taxable @ 5%.

6. The applicant further contends that even though all general cosmetics products are coming under 14.5% category, it is very clear that the legislature intends to give special rebate of 5% to all ayurvedic cosmetics containing added medicaments and manufactured under drug license granted under the Drugs and Cosmetics Act 1940 as per entry No. 36(27) of third schedule to the KVAT Act. Therefore it cannot be mis-clarified as done in earlier clarification order C3/28127/1/CT through which wrongly limiting 5% tax rate to those products coming under HSN code 3003.90.11.

7. The applicant further argued that there are so many items in the third schedule without specifying any HSN code whereas attributing some condition for including in the 5% reduced rate category even though those items were included in the 14.5% category with 8 digit HSN code.

8. The request of the applicant is to clarify the ayurvedic cosmetics such as ayurvedic soaps, ayurvedic paste, ayurvedic mouth wash, baby gift packs and ayurvedic powder which fulfill all the three specific conditions would come under the entry 36(27) of third schedule taxable @ 5%.

9. The applicant has submitted samples of the following 6 products viz. 'Intense Oil Clear Lemon Face Wash for men', 'Nourishing Cream & Honey Soap', 'Moisturizing Almond Soap & Refreshing Cucumber Soap', 'HiOra-K Mouthwash' and 'Happy Baby Gift Pack' at the time of hearing.

10. The authorised representative of the applicant was heard in the matter and the contentions raised were examined in the light of the judgment of the Hon'ble High Court.

11. As per sec. 6(1)(a) of the KVAT Act, the liability to pay tax shall be, in the case of goods specified in the second and third schedules, at the rates specified therein and at all points of sale of such goods within the State. In the case of goods not falling under clauses (a) or (c), the liability to pay tax shall be at the rate of 14.5% at all points of sale of such goods within the State. As per Entry 36(27) of the Third Schedule to the KVAT Act, 'ayurvedic cosmetics containing added medicaments and manufactured under drug license granted under the Drugs and Cosmetics Act, 1940' attract tax @5%. However, this Entry has not been provided with HSN Number.

12. As per the rules of interpretation of schedules, those commodities which are not given with HSN Number, should be interpreted, as the case may be, in common parlance or commercial parlance. HSN Numbers are allotted in the schedules either in four digits or in six digits or in eight digits. The commodities which are given eight digit HSN Number shall mean that commodity which bears that HSN Number. Further, while interpreting a commodity, if any inconsistency is observed between the meaning of a commodity without HSN Number and the meaning of a commodity with HSN Number, the commodity should be interpreted by including it in that entry which is having the HSN Number. Item VI(23) of the Rules of Interpretation of

schedules specifically states that Entry 36 in the Third Schedule does not include soaps or other products containing added medicaments.

13. 'Cosmetics' are substances or products used to enhance or alter the appearance or fragrance of the body. Many cosmetics are designed for applying on the face or hair. Common cosmetics include lipstick, mascara, eye shadow, foundation, rouge, skin cleansers and skin lotions, shampoo, hairstyling products (gel, hair spray etc.), perfume and cologne. Cosmetics applied to the face to enhance its appearance are often called make-up. The Food and Drug Administration (FDA) defines 'cosmetics' as intended to be applied to the human body for cleansing, beautifying, promoting attractiveness, or altering the appearance without affecting the body's structure or functions. Toiletries are articles used in washing and taking care of one's body, such as soap, shampoo, and toothpaste. Thus, all toiletries are not cosmetics.

14. In the light of the above legal and factual position, tax rate of the following commodities are clarified as under-

(a) Ayurvedic soap

Ayurvedic soap does not have any therapeutic or prophylactic use. Therefore, it is not a medicament. Commonly, as well as commercially, soap including medicated soap, is known as a toilet article. It is certainly not considered to be a cosmetic, or make-up article. Therefore, ayurvedic soap will not fall under any of the sub-entries of Entry 36 of the Third Schedule, including sub-entry 27. The said product, shall squarely come under the heading 'Medicated toilet soap' in Entry 27(1)(a) of SRO No. 82/2006, bearing HSN No. 3401.11.10, and therefore, attracting tax @ 14.5%.

b) Ayurvedic tooth paste

Ayurvedic tooth paste does not have any therapeutic or prophylactic use. Therefore, it is not a medicament. Commonly, as well as commercially, tooth paste (whether medicated or not) is known as a toilet article. It is certainly not known as a cosmetic or make-up article. Therefore, ayurvedic tooth paste will not fall under any of the sub-entries of entry 36 of the Third schedule, including sub-entry 27. The said product shall squarely come under Entry 92(1) of the SRO No. 82/2006, bearing the eight digit HSN No. 3306.10.20. and therefore, attracting tax @ 14.5%.

c) Ayurvedic mouth wash

Ayurvedic mouth wash does not have any specific therapeutic or prophylactic use. Therefore, it is not a medicament. In common as well as commercial parlance, mouth wash cannot be termed as a cosmetic. It is used for maintaining oral or dental hygiene. Therefore, ayurvedic mouth wash will not fall under Entry 36(27) of the Third Schedule. The said product is squarely covered under Entry 92(6) of S.R.O.No. 82/2006, bearing the eight digit HSN No. 3306.10.90, and, therefore, attracting tax @ 14.5%.

d) Baby Gift Pack

'Baby Gift Pack' comprises of ayurvedic baby soap, ayurvedic baby powder, ayurvedic baby oil, ayurvedic baby lotion and wipes. Since major items in the pack are taxable @ 14.5%, the pack as a whole attracts tax @14.5% which would fall under Entry 103 of S.R.O.No. 82/2006.

d) Ayurvedic powder

Ayurvedic powder is used to make the skin soft, and to keep it dry. It is more of a toilet article than a cosmetic. Therefore, the said product would not come under Entry 36(27) of the Third Schedule. Further, make-up articles, under Entry 25 of SRO No. 82/2006, specifically excludes talcum powder. In the circumstances, ayurvedic powder will squarely fall under the heading 'prickly heat powder and similar medicated body powder' in Entry 25(2) of SRO. No. 82/2006, attracting tax @ 14.5%.

The issues raised above are clarified accordingly.

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O/o CCT

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To

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