

PROCEEDINGS OF THE ASSISTANT COMMISSIONER (APPEALS)
STATE GOODS AND SERVICES TAX, KANNUR

Present : Vineth Krishna.U

Date of Order: 26.02.2020

KVATA Appeal order VATA No. : VATA 133/19,136/19,144/19
Instituted on : 17.01.2019 & 29.05.2019
From the orders of the : Order no. 32120296255/2013-14 to
2015- 16 (CST) dated 28.02.2019
04.12.2018 & 29.04.2019,
of State Tax Officer, 2nd Circle, Kannur

Year of assessment : 2013-14 to 2015-16(CST)
Name of appellant : M/s. Talash Plastopacks, Pappinisseri

Turnover assessed :
Tax demanded Income Tax/Super Tax/CST/ST : Rule 6(5), CST (Kerala) Rules, 1957
Section /Rule under assessment made

Date of Hearing : 30.01.2020
Present for Appellant : Advocate Archana.T

APPELLATE ORDER AND GROUNDS OF DECISION

The appellant M/s. Talash Plastopacks, Pappinisseri filed appeal against the assessment order of State Tax Officer, 2nd Circle, Kannur passed u/s rule 6(5) of CST rules issued vide proceedings dated 25.02.2019,04.12.2018,29.04.2019 demanding tax Rs.332084/- Rs.294564/- and Rs.279585/- for the years 2013-14 to 2015-16 respectively.

As the appellant is same and the issues are similar, all the three appeals are heard together and disposed through a common order.

The assessment for the year was revised on the basis of detection of mis classification effected by the appellant.

When the appeal was posted for hearing Sri. Archana.T, Advocate appeared on behalf of the appellant and was heard. The contentions put forth by the appellant are as follows.

2013-14

1. *The Order of the assessing authority is against law, facts and circumstances of the case.*

2. *As per the earlier clarification of the Clarifying authority vide C3/22114/16 dated 08/08/2017 the rate of tax on sale of containers, bowls and trays is only 5% whereas, as per the order of the Commissioner under Section 94 (7), it is taxable at 14.5%. This is only a change of opinion without application of mind but based purely on the query of Audit party by the Accountant General.*
3. *The audit party of the Accountant General after auditing the concerned assessing office pointed out that containers are taxable at 20%. Whereas after auditing the clarification file of the clarifying authority who clarified it as taxable at 5%, pointed out that it is taxable at 12.5%/13.5%/14.5%. This shows that audit party itself is not sure whether this is taxable at 5% or 12.5%/13.5%/14.5% or 20%.*
4. *The assessing authority should have appreciated that, under Central Excise Duty all plastic packing materials and articles of conveyance come under 3923 90 90, taxable at 12.5%, wherein any of the items have not been carved out as carved out from Entry 174 Third Schedule to KVAT Act 2003. Therefore whether the items manufactured and sold are plastic bags, cups, plates or leaves or tumblers or Styrofoam attracts same rate under Central Excise Duty and the Appellant has conceded his product in ER 1 Return under Entry 3923 90 90, which is the most appropriate Entry so far as Central Excise Duty is concerned.*
5. *The assessing authority has grossly erred in assessing sale of packing materials for connectors to the tune of Rs 17,22,083/- at 14.5% when the packing materials for connectors is taxable only at 5% under specific Entry 174(1)(d) of Third Schedule of the KVAT Act. The copy of the list of packing materials for connectors and ledger extract of the buyers of the connectors are produced and marked as Exhibit P1 and Exhibit P2.*
6. *The assessing authority should have appreciated that the packing cases for accommodating connectors is coming under Entry 3923.10.40 which is taxable only at 5%.*
7. *The assessing authority should have appreciated that "lids made of plastic" are packing materials taxable at 5% by virtue of 174 (9) a of List A to Third Schedule.*
8. *The assessing authority has grossly erred in assessing lids made of plastic at 14.5% when there is a specific Entry under 174 (9) a of List A of Third Schedule. The copy of the statement and ledger extract are produced and marked as Exhibit P3.*
9. *The assessing authority should have appreciated that the sale of connectors and lids has not been included in the items, which have been clarified as taxable at 12.5%/13.5%/14.5%.*
10. *Turnover for the Sale of Plastic film as per Invoice No.0893 dated 17.02.2014 to M/s. AVI Global Plast Pvt. Ltd., Daman is Rs.57,144.00. Plastic film is liable to tax only at the rate 5% as per Entry under 60 of List A of Third Schedule.*
11. *The Tax paid as per CST Assessment Order No. 321202 96255/2013-14 Dt. 06.12.2014 for Rs. 55,998.00 made as per Cheque No. 630550 Dt. 15.12.2014 on SBI was not given Credit in the Current Order.*
12. *The assessing authority should have appreciated that the containers, trays and bowls made of plastic are taxable only at 5% under Entry 174 (8) of third schedule List A industrial inputs and packing materials to KVAT Act. The dispute with regard to rate of tax on containers, trays and bowls are pending before the Hon'ble Supreme Court and therefore the assessing authority should have deferred the matter till the decision is rendered by the Hon'ble Supreme Court.*

13. *The assessing authority should have appreciated that the rate of tax on plastic containers is taxable only at 5% at the website of the department.*
14. *The assessing authority should have further appreciated that as per Appendix to Rules of Interpretation of Schedules the items which have no HSN should be interpreted in common parlance and both Entry 174 and 174 (8) of List A to third schedule do not have HSN.*
15. *So also as per clause 43 of Rules of Interpretation Schedule 'goods given in List A to third schedule as "industrial inputs and packing materials" shall attract the rate of tax applicable to third schedule regardless to the purpose for which such goods have been purchased'.*

2014-15

1. *The Order of the assessing authority is against law, facts and circumstances of the case.*
2. *As per the earlier clarification of the Clarifying authority vide C3/22114/16 dated 08/08/2017 the rate of tax on sale of containers, bowls and trays is only 5% whereas, as per the order of the Commissioner under Section 94 (7), it is taxable at 14.5%. This is only a change of opinion without application of mind but based purely on the query of Audit party by the Accountant General.*
3. *The audit party of the Accountant General after auditing the concerned assessing office pointed out that containers are taxable at 20%. Whereas after auditing the clarification file of the clarifying authority who clarified it as taxable at 5%, pointed out that it is taxable at 12.5%/13.5%/14.5%. This shows that audit party itself is not sure whether this is taxable at 5% or 12.5%/13.5%/14.5% or 20%.*
4. *The assessing authority should have appreciated that as far as the Appellant is concerned, under Central Excise Duty all plastic packing materials and articles of conveyance come under 3923 90 90, taxable at 12.5%, wherein any of the items have not been carved out as carved out from Entry 174 Third Schedule to KVAT Act 2003. Therefore whether the items manufactured and sold are plastic bags, cups, plates or leaves or tumblers or Styrofoam attracts same rate under Central Excise Duty and the Appellant has conceded his product in ER I Return under Entry 3923 90 90, which is the most appropriate Entry so far as Central Excise Duty is concerned.*
5. *The assessing authority has grossly erred in assessing Interstate sale of packing materials for connectors to TE Connectivity India P Ltd, Industrial Area, Whitefiled Road, Bangalore for Rs 33,56,205/-. The copy of the list of packing materials for connectors is produced and marked as **Exhibit P1**.*
6. *The assessing authority should have appreciated that the packing cases for accommodating connectors is coming under Entry 3923.10.40 which is taxable only at 5%.*
7. *The assessing authority should have appreciated that the list of sales of packing materials for connectors has already been furnished to him and from which it can be understood that the above turnover represents sales of packing materials for connectors. The copy of ledger extract is produced and marked as **Exhibit P2**. The copy of certificates of TE Connectivity India P Ltd, Bangalore is produced and marked as **Exhibit P3**.*
8. *The assessing authority has grossly erred in assessing sale of lids at 14.5% as the same is covered under specific Entry 174 (9) a of the third schedule List A industrial inputs and packing materials to KVAT Act. Sale of lids comes to*

Rs 43,639/-, taxable only at the rate of 5%. The copy of the statement and ledger extract are produced and marked as Exhibit P4.

9. The assessing authority should have appreciated that the sale of connectors and lids has not been included in the items, which have been clarified as taxable at 12.5%/13.5%/14.5%.

10. The assessing authority should have appreciated that the containers, trays and bowls made of plastic are taxable only at 5% under Entry 174 (8) of third schedule List A industrial inputs and packing materials to KVAT Act. The dispute with regard to rate of tax on containers, trays and bowls are pending before the Hon'ble Supreme Court and therefore the assessing authority should have deferred the matter till the decision is rendered by the Hon'ble Supreme Court.

11. The assessing authority should have appreciated that the rate of tax on plastic containers is taxable only at 5% at the website of the department.

12. The assessing authority should have further appreciated that as per Appendix to Rules of Interpretation of Schedules the items which have no HSN should be interpreted in common parlance and both Entry 174 and 174 (8) of List A to third schedule do not have HSN.

13. So also as per clause 43 of Rules of Interpretation Schedule 'goods given in List A to third schedule as "industrial inputs and packing materials" shall attract the rate of tax applicable to third schedule regardless to the purpose for which such goods have been purchased'.

2015-16

1. The Order of the assessing authority is against law, facts and circumstances of the case.

2. As per the earlier clarification of the Clarifying authority vide C3/22114/16 dated 08/08/2017 the rate of tax on sale of containers, bowls, box and trays made of plastic is only 5% whereas, as per the order of the Commissioner under Section 94 (7), it is taxable at 14.5% under Entry 103 of List A attached to SRO 82/2003. This is only a change of opinion without application of mind but based purely on the query of Audit party by the Accountant General.

3. The audit party of the Accountant General after auditing the concerned assessing office pointed out that containers are taxable at 20%. Whereas after auditing the clarification file of the clarifying authority who clarified it as taxable at 5%, pointed out that it is taxable at 12.5%/13.5%/14.5%. This shows that audit party itself is not sure whether this is taxable at 5% or 12.5%/13.5%/14.5% or 20%.

4. The assessing authority should have appreciated that as far as the Appellant is concerned, under Central Excise Duty all plastic packing materials and articles of conveyance come under 3923 90 90, taxable at 12.5% OF Central Excise Duty, wherein any of the items have not been carved out as carved out from Entry 174 Third Schedule to KVAT Act 2003. Therefore whether the items manufactured and sold are plastic bags, cups, plates or leaves or tumblers or Styrofoam attracts same rate under Central Excise Duty and the Appellant has conceded his product in ER 1 Return under Entry 3923 90 90, which is the most appropriate Entry so far as Central Excise Duty is concerned.

5. The assessing authority has grossly erred in assessing Interstate sale of packing materials for connectors sold to M/s. TE Connectivity India Pvt. Ltd. for Rs 29,43,172/-. The copy of the list of sale of packing materials for connectors is produced and marked as **Exhibit P1**.

6. The assessing authority should have appreciated that the packing cases for accommodating connectors comes under Entry 174(1)(d) against HSN 3923.10.40 which is taxable only at 5%.

7. The assessing authority should have appreciated that the list of sales of packing materials for connectors has already been furnished to him and from which it can be understood that the above turnover represents sales of packing materials for connectors. The copy of ledger extract is produced and marked as **Exhibit P2**. The copy of certificates of M/s. TE Connectivity India. is produced and marked as **Exhibit P3**.

8. The assessing authority should have appreciated that the sale of connectors has not been included in the items, which have been clarified as taxable at 12.5%/13.5%/14.5% by the Commissioner.

9. The assessing authority should have appreciated that the containers, trays and bowls made of plastic are taxable only at 5% under Entry 174 (8) of third schedule List A industrial inputs and packing materials to KVAT Act. The dispute with regard to rate of tax on containers, trays and bowls is pending before the Hon'ble Supreme Court in SLP No 3757/2019 and therefore the assessing authority should have deferred the matter till the decision is rendered by the Hon'ble Supreme Court.

10. The assessing authority should have appreciated that the rate of tax on plastic containers is taxable only at 5% at the website of the department.

11. The assessing authority should have further appreciated that as per Appendix to Rules of Interpretation of Schedules the items which have no HSN should be interpreted in common parlance and both Entry 174 and 174 (8) of List A to third schedule do not have HSN.

12. So also as per clause 43 of Rules of Interpretation Schedule 'goods given in List A to third schedule as "industrial inputs and packing materials" shall attract the rate of tax applicable to third schedule regardless to the purpose for which such goods have been purchased'.

14. As per Section 17 of the Constitution 101 Amendment Act, 2016, the field of legislation under Entry 54 List II has been restricted to petroleum products and liquor meant for human consumption only with effect from 16/09/2017. Therefore clarification issued on 08/05/2018 with regard to the rate of tax on plastic containers, bowls, trays and boxes has no legal validity as it is beyond the powers of the Constitution as amended as per 101 Amendment Act.

The appellant further prayed that the appeals may be allowed on the above grounds.

The issue involved in these cases is as to the sustainability of assessment made.

The appellant argued that under central excise duty, all plastic material and articles of conveyance comes under 3923. 90. 90 taxable at 12.5% where in any of the items have not been carved out as from Entry 174 third Schedule to KVAT Act, 2003. They stated that they hence conceded the product in ER1 return under Entry 3923.90.90 which is the most appropriate entry. They stated that the assessing authority erred in assessing local sale of packing material for connectors. They stated that packing cases for accomodating connectors comes under Entry 3923.10.40 which is taxable at 5%. They stated that lids made of plastic are

packing material taxable at 5% by virtue of 174(9) of List A to third schedule. They stated that lids made of plastic has specific entry under 174(9) of the List A to third schedule and hence assessing lids at 14.5% is erroneous. They stated that sale of connectors and lids has not been included in items which have been clarified as taxable at 12.5%/13.5%/14.5%. They stated that tax paid as per CST assessment order for 2013-14 for Rs.55998/- was not given credit. They stated that containers, trays and bowls made of plastic are taxable only at 5% under entry 174(8) of third schedule List A industrial inputs and packing materials to KVAT Act. They stated that the dispute with regard to rate of tax on container, trays and bowls are pending before Hon'ble Supreme Court and hence assessing authority ought to have deferred the matter. They stated that as per appendix to rules of interpretation of schedule the items which have no HSN should be interpreted in common parlance and both Entry 174 & 174(8) of List A to third schedule do not have HSN. They also argued that as per clause 43 of Rules of interpretation schedule "goods given in List A to third schedule as 'industrial input and packing materials' shall attract rate of tax applicable to third schedule regardless of the purpose for which such goods have been purchased. They further argued that the classification issued is beyond the powers envisaged in constitution as amended by 101st Amendment Act.

The appellant produced list of inter-state sales of trays for packing of connectors to manufacturers for the years. They also produced copy of ledger account and sales summary in support of their arguments. The argument of the appellant was examined with the sale invoices produced by the appellant. The sale invoices produced pertain to local sales effected by the appellant. The customs tariff item no. shown in all the invoices is 3923.90.90. The description of goods mentioned is FCI tray, FCI Lid, Hinged Containers, Rice bowl, Briyani container, Cake tray, Sandwich tray, Lunch tray etc.

The Hon'ble Commissioner of State tax has under section 94(7) of the Act has clarified that rate of tax of goods bearing HSN code 3923.90.90 is 12.5/13.5/14.5%. Commodities like plastic tray, Plastic container, plastic box, plastic bowl and plastic lid were clarified as coming under 12.5/13.5/14.5%/ category. The appellant had conceded all the commodities under the HSN 3923.90.90. The clarification made by the Commissioner has also been upheld by the Division bench of Hon'ble High Court of Kerala in OT Appeal No.2 of 2018. There isn't any kind of stay from the Hon'ble Supreme Court of India. Hence the assessments made in this regard is sustainable and accordingly is upheld. The argument of appellant vis-a-vis commodities like stopper lid, tray for packing connectors etc also is not acceptable as the HSN shown in the invoice is 3923.90.90 which stands clarified as per the clarification of the Commissioner and also has been upheld by the Hon'ble High Court. Moreover verification of invoice produced by appellant also shows that the commodities are as those included in the clarification. The appellant failed in differentiating the commodities. Tax paid if any can be given credit by effecting rectification.

The argument of appellant against constitutionality of the clarification made in the wake of 101st amendment to the Constitution is also not acceptable. The Hon'ble High Court has upheld the powers which emanates from Section 174 of the SGST Act, 2017. The Court also observed that it was the appellant who invoked section 94 and obtained a favourable order from the nominated authority and hence they cannot argue against consequential powers which flows from the very same provision. Hence the argument of appellant is rejected.

In the circumstances, the appeals filed by the appellant are found devoid of merit and is hence dismissed.

No other points for consideration. Ordered accordingly

RESULT : VATA 133/19
VATA 136/19 DISMISSED
VATA 144/19

Assistant Commissioner (Appeals),
Kannur.

To : The appellant through Advocate
Copy submitted to The Joint Commissioner (Law), CCT, Tvp.
The Deputy Commissioner, Kannur

Copy to :
The Law Officer, Commercial Taxes, Kozhikode
The Inspecting Assistant Commissioner, Kannur
The State Tax Officer, 2nd Circle, Kannur
Spare/index/file.