HIGH COURT OF JUDICATURE FOR RAJASTHAN
BENCH AT JAIPUR

S.B. Sales Tax Revision / Reference No. 119/2020

Ms Pepsico India Holdings Private Ltd., F-549, Road No. 6 Vki Area Jaipur- Through Its Authorized Signatory Shri Chitwan Prabhakar Aged 33 Year S/o Shri Virendra Prabhakar

----Petitioner

Versus

Assistant Commissioner, Commercial Taxes Department , Special Circle Rajasthan, Jaipur.

----Respondent

Connected With

S.B. Sales Tax Revision / Reference No. 121/2020

M/s Pepsico India Holdings Private Ltd, F-549, Road No. 6 Vki Area Jaipur- Through Its Authorized Signatory Shr Chitwan Prabhakar Age 33 Yr S/o Shri Virendra Prabhakr

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Assistant Commissioner Anti Evasion, Zone-Ii, Commercial Taxes Department Jaipur.

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----Petitioner

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Assistant Commissioner, Commercial Taxes Department, Special Circle Rajasthan, Jaipur.

----Respondent

For Petitioner(s)	:	Mr. Rohan Shah with Mr. Maneesh Sharma, Mr, Manish Mishra, Mr. Chayank Bohra, Mr. Lakshay Pareek, Mr. Shreyansh Sharma
For Respondent(s)	:	Mr. Punit Singhvi with Mr. Ayush Singh

HON'BLE MR. JUSTICE SAMEER JAIN

Order

Reserved on – 12/07/2023
Pronounced on – 06 /10/2023

1. The present Sales Tax Revisions / References (for short "STRs"), filed under Section 84 of the Rajasthan Value Added Tax Act, 2003 (for short "RVAT Act"), were admitted on following questions of law:

> "(i) Whether the learned Tax Board is justified in holding that Kurkure and Cheetos are not classifiable as Namkeen under Entry 131 of Schedule IV, holding that the products will fall under Schedule V (Residual Rate) of the VAT Act, just because similar contention was turned down while interpreting different entries under the erstwhile Rajasthan Sales Tax Act, 1994?
>
> (ii) Whether the learned Tax Board is right in adopting a restricted meaning for the term "namkeen" in interpreting the scope of Entry 131 of the Schedule IV?"

2. As common issue of classification of 'Kurkure' and 'Cheetos' is involved in all these STRs, with the consent of the parties, they were heard together and are now being decided by way of this common order. STR No. 119/2020 is taken as lead file to peruse the facts.

3. Learned counsel for the petitioner-assessee submits that the petitioner-assessee is a private limited company incorporated under the provisions of the Indian Companies Act 1956 having registered office at Gurugram, Haryana (formerly known as 'Gurgaon') and having its principal place of business in the State of Rajasthan at Jaipur. The petitioner-assessee is also a registered dealer under the RVAT Act and is engaged in the sale of various food products, including the goods in question, i.e. *'Kurkure'* and *'Cheetos'*. The petitioner-assessee is also engaged in the sale of branded potato chips, which are sold under the brand name of 'Lays' and 'Uncle Chips'. The petitioner-assessee was self classifying the goods in question along with the branded potato chips under Entry 131 [Sweetmeat Deshi (including Gajak & Revri), bhujiya, branded and unbranded namkeens.] of Schedule IV to the RVAT Act and paying tax @ 4% / 5%. A survey was conducted at the business premises of the petitioner-assessee for the assessment year 2011-2012, which ultimately resulted into passing of the impugned Assessment Order dated 20.09.2016, wherein the Revenue classified the goods in question along with the branded potato chips under the Residual Entry under Schedule V to the RVAT Act attracting tax @ 12.5% / 14%. Accordingly, the differential tax and interest was imposed upon the petitioner-

assessee vide assessment order dated 20.09.2016. The appeal against the said assessment order was partly allowed by the first Appellate Authority vide order dated 20.11.2017, to the extent of classification of branded potato chips being covered under Entry 107 of Schedule IV to the RVAT Act. Therefore, the differential tax and interest qua the branded potato chips was deleted but the classification of 'Kurkure' and 'Cheetos' under the residual entry of Schedule V to the RVAT Act was maintained. The Rajasthan Tax Board also dismissed the appeal filed by the petitioner-assessee vide order dated 03.01.2020 and maintained the levy of additional tax and interest by classifying 'Kurkure' and 'Cheetos' under the residual Entry No. 78 of Schedule V to the RVAT Act. Being aggrieved, the present STRs were filed.

4. Learned counsel for the petitioner-assessee has challenged the classification adopted by the Revenue, of the goods in question under residual entry, primarily, on the following grounds:

4.1) The first submission of learned counsels for the petitioner-assessee is that the revenue has not discharged its onus to prove that the goods in question, i.e. 'Kurkure' and 'Cheetos' could not be considered 'namkeen' and covered under Entry 131 of Schedule IV to the RVAT Act. In support of his claim that the goods in question would qualify as 'namkeen', learned counsel for the petitioner-assessee has placed reliance on definition of namkeen as provided by the Bureau of Indian Standards. Learned counsel for the petitioner-assessee has also emphasized that on the packaging material of the goods in

question, the word 'namkeen' is prominently displayed and the ingredients used therein also establishes that the goods in question would be considered 'namkeen'. The FSSAI license classifying the goods in question as namkeen is also highlighted by learned counsel for the petitioner-assessee. Learned counsel for the petitioner-assessee further submits that as per Hon'ble Supreme Court judgments of **Parle Agro (P) Ltd. and Ors. vs. Commissioner of Commercial Taxes, Trivandrum and Ors. (Neutral Citation: 2017/INSC/458)** reported in **2017 (352) ELT 113 (SC)**, **Commissioner of Central Excise vs. Hindustan Lever Ltd. (Neutral Citation: 2015/INSC/606)** reported in **2015 (323) ELT 209 (SC)**, and **Muller and Phipps (India) Ltd. vs. The Collector of Central Excise, Bombay-I** reported in **2004 (167) ELT 374 (SC)**, reliance can be placed on relevant food laws to determine the classification of food products. In furtherance of the submission that the goods in question would be considered namkeen, reliance is also placed on judgment of Hon'ble Supreme Court in **Commissioner of Central Excise, Pune-II vs. Frito Lays India** reported in **(2009) 10 SCC 752** and judgment of CESTAT Delhi in **Pepsi Foods Ltd. vs. Commr. of Cus. and C. Ex., Chandigarh-II** reported in **2003 (151) ELT 180 (Tri.-Del.)**, which was upheld by the Hon'ble Supreme Court vide order dated 26.07.2011 in Civil Appeal Nos. 4055-4058 of 2003 titled as CCE, Chandigarh-III vs. M/s Pepsi Foods Ltd.

4.2) The second submission of learned counsel for the petitioner-assessee is that the reliance placed by the Revenue and the Tax Board on the Co-ordinate Bench judgment of **Pepsico**

India Holdings Private Ltd. vs. CTO, Special Circle Rajasthan, Jaipur and Ors. (S.B. STR No. 194/2009; decided on 22.12.2016) reported in **[2018] 50 GSTR 191 (Raj.)** is also onerous as the judgment pertained to classification of potato chips, Kurkure and Cheetos under the erstwhile Rajasthan Sales Tax Act, 1994 (for short "RST Act"), wherein the dispute was within two specific entries and the Court opined that those goods would fall under the category of 'preserved foods'. Learned counsel for the petitioner-assessee strongly contends that the said judgment is not applicable in the facts and circumstances of the present case and has drawn attention of this Court to the following excerpt of the said judgment:

> *"I do concur with the arguments of the learned counsel for the Revenue that the product in which the assessee is dealing, though technically can be said to be namkin but taking into consideration the specific entry under the Act, it can only be placed in the category of 'preserved food article' "*

Learned counsel for the petitioner-assessee contends that the issue before the Co-ordinate Bench was with regard to applicability of two specific entries, whereas in the present case the issue is applicability of specific entry over general entry. The essence of the above quoted Co-ordinate Bench judgment, where goods in question were held to be preserved foods, is not applicable in the present case because under the RVAT Act, there is no specific entry named 'preserved foods' and in the absence of such specific entry, reliance placed on the said judgment is unsustainable. Reliance in placed on Apex Court judgment of **X vs. Registrar General, High Court of Madhya Pradesh and Ors.**

(Neutral Citation: 2022/INSC/171) reported in **2022 SCC OnLine SC 171** to submit that one additional or different fact can make a world of difference between conclusion in two cases even when the same principles are applied in each case to similar facts. Learned counsel for the petitioner-assessee has further highlighted that against the Co-ordinate Bench judgment dated 22.12.2016, the petitioner-assessee has preferred an appeal which is pending adjudication with the Hon'ble Supreme Court in Civil Appeal Nos. 15693-15695 of 2017 arising out of SLP (Civil) No. 19671/2017.

4.3) The third submission of learned counsels for the petitioner-assessee is that it is an established cannon of classification that a specific entry would override a general entry. Reliance in this regard is placed on Apex Court judgments of **Bharat Forge and Press Industries (P) Ltd. vs. Collector of Central Excise, Baroda, Gujarat** reported in **1990 (45) ELT 525 (SC)**, **Dunlop India Ltd. vs. Union of India reported in (1976) 2 SCC 241**, **Mauri Yeast India Pvt. Ltd. vs. State of Uttar Pradesh** reported in **(2008) 5 SCC 680**, **Commissioner of Commercial Tax, U.P. vs. A.R. Thermosets (Pvt.) Ltd.** reported in **(2016) 16 SCC 122**, **State of Maharashtra vs. Bradma of India Ltd.** reported in **(2005) 140 STC 17 (SC)**, **Hindustan Poles Corporation vs. Commissioner of Central Excise, Calcutta** reported in **(2006) 145 STC 625 (SC)**, and **Krishi Utpadan Mandi Samiti and Ors. vs. Ved Ram** reported in **2012 (277) ELT 299 (SC)**. It is stated that a special entry must prevail over the general entry and that the residuary clause

can be invoked only if the department can establish that the goods in question can, by no conceivable process of reasoning, be brought under any of the tariff items.

4.4) The fourth submission of learned counsel for the petitioner-assessee is that the goods in question were specifically included in Entry No. 16 of Schedule V to the RVAT Act only w.e.f. 14.07.2014 and the rate of tax was enhanced to 14%. However, such enhancement of tax cannot be given retrospective application as the notifications are deemed to apply prospectively unless either expressly specified to apply retrospectively. Reliance in this regard is placed on Apex Court judgments of **L.R. Brothers Indo Flora Ltd. vs. Commissioner of Central Excise (Neutral Citation: 2020/INSC/525)** reported in **2020 (373) ELT 721 (SC)** and **Commissioner of Income Tax vs. Vatika Township Private Limited (Neutral Citation: 2014/INSC/629)** reported in **(2015) 1 SCC 1**. In the case in hand, the Schedule V to the RVAT Act was *substituted* vide Notification dated 14.07.2014 and only thereafter the goods in question were incorporated under Schedule V and therefore there is no question of the notification having retrospective application.

4.5) The fifth submission of learned counsel for the petitioner-assessee is that even as per common parlance test, the goods in question are considered to be 'namkeens'. Reliance is placed on affidavits from traders and consumers of the goods in question to buttress the submission that the goods in question are perceived to be 'namkeen' in the common parlance. Reliance is also placed on Apex Court judgments of **Collector of Central**

Excise, Kanpur vs. Krishna Carbon Paper Co. reported in **(1989) 1 SCC 150**, **Ramavatar Budhaiprasad and Ors. vs. Assistant Sales Tax Officer, Akola** reported in **AIR 1961 SC 1325**, **Purnia vs. State of Orissa** reported in **AIR 1979 SC 1454**, **Indian Cable Company Ltd., Calcutta vs. Collector of Central Excise, Calcutta and Ors.** reported in **1994 (74) ELT 22 (SC)**, **Collector of Central Excise vs. Fusebase Eltoto Ltd. reported in 1993 (67) ELT 30 (SC)**, and **Commissioner of Customs, Central Excise and Service Tax, Hyderabad vs. Ashwani Homeo Pharmacy (Neutral Citation: 2023/INSC/483)** reported in **2023 SCC OnLine SC 558**.

4.6) The sixth submission of learned counsel for the petitioner-assessee is that the Tax Board has erroneously relied upon information available on the petitioner's global website, which is headquartered in United States of America. As per the impugned order, the petitioner is selling several variants of Cheetos, which is factually incorrect as the products manufactured by the petitioner's global counterparts significantly vary in their manufacturing process and are specified to varied geographies. The said variants of Cheetos are not available or sold in India and any information gathered from the international website regarding said products sold abroad cannot be relied upon in the instant case.

4.7) The seventh submission of learned counsel for the petitioner-assessee, without prejudice to his other submissions, is that as per settled position of law, in case there are two competing entries in which the product can be classified, the one

that is more beneficial to the assessee should be given preference. Reliance in this regard is placed on Apex Court judgment of **Commnr. of Central Excise, Bhopal vs. Minwool Rock Fibers Ltd.** reported in **2012 (3) SCALE 37**.

5. *Per contra*, supporting the concurrent findings of the authorities below, learned counsels for the respondent-revenue contends that no question of law worth consideration arises in the present STRs. It is submitted that the issue involved is squarely covered by Co-ordinate Bench judgment of assessee's own case of **Pepsico India Holding (S.B. STR No. 194/2009; decided on 22.12.2016) (supra)** wherein the exact same contentions of the petitioner-assessee were rejected and the goods in question were held to be 'preserved food articles' under the RST Act and though an appeal has been preferred, no stay has been granted and therefore the said judgment still holds the field. The entry of 'preserved food articles' was changed to 'preserved vegetables' in the RVAT Act, as a result of which the goods in question could no longer fall under the specific entry of 'preserved vegetables' and had to be accommodated in the residual entry. Learned counsel for the respondent-revenue further contends that the judgments relied upon by the petitioner-assessee wherein the goods in question have been classified as 'namkeen' pertains to Excise Act and have no application in the instant case, more so when the goods in question are 'namkeen snacks' and not 'namkeen'. Learned counsel for the respondent-revenue has also relied upon Notification dated 14.07.2014, through which the goods in question were specifically added to Schedule V to the RVAT Act, to

submit that the intention of the Legislature was always to tax the goods in question at the rate prescribed under Schedule V to the RVAT Act. It is submitted that subsequent legislation can be looked into to ascertain the intention of the legislation and reliance in this regard is placed on para 13.3 of judgment of this Court in the case of **M/s Compuage Infocom vs. The Assistant Commissioner, Rajasthan** and other connected matters **(S.B. STR No. 182/2017; decided on 30.05.2023; Neutral Citation: 2023/RJJP/012108)**.

6. Heard the arguments advanced by both the sides, scanned the record of the STRs and considered the judgments cited at Bar.

7. The *lis* in question pertains to classification of proprietary food items 'Kurkure' and 'Cheetos', manufactured by the petitioner-assessee. As per the petitioner-assessee, the goods in question, for the relevant period, would fall under the category of namkeen and would thus fall under Entry 131 of Schedule IV to the RVAT Act, which reads as *"Sweetmeat Deshi (including Gajak & Revri), bhujiya, branded and unbranded namkeens."* On the contrary, the respondent-revenue contends that the good in questions are snacks and because snacks are not covered under any specific entry, the same would necessarily fall under the residual/orphan entry in Schedule V to the RVAT Act. As per settled position of law, a specific entry would always trump a general entry and the burden would always be on the Revenue to prove that the goods in question would have to fall in general entry as opposed to the specific entry.

8. From the perusal of the order of the Tax Board, it appears that the decision of the learned Tax Board holding the goods in question as 'snacks' and not 'namkeen' was based on the following factors:

(a) Because the same contention of petitioner-assessee, classifying the goods as 'namkeen', was rejected by Co-ordinate Bench of this Court under the erstwhile RST regime in the case of **Pepsico India Holding (S.B. STR No. 194/2009; decided on 22.12.2016) (supra)**.

(b) Because as per the information available on the petitioner's own website, Kurkure and Cheetos are snacks having various iterations/flavours.

(c) Because of the ingredient mentioned on the packaging of the goods in question, the goods in question cannot be considered as namkeen.

9. Having gone through the record and after careful analysis of the Co-ordinate Bench judgment of **Pepsico India Holding (S.B. STR No. 194/2009; decided on 22.12.2016) (supra)**, this Court is of the considered view that the Tax Board has misinterpreted the dictum of **Pepsico India Holding (S.B. STR No. 194/2009; decided on 22.12.2016) (supra)**. The said judgment, apart from being under the erstwhile regime of RST Act, pertained to classification within two competing specific entries. Whereas, in the case in hand, the specific entry is competing with the general/residual entry. As per settled position of law, when two specific entries equally merit consideration, the more specific would prevail. Reliance in this regard can be placed

on Apex Court judgment of **HPL Chemicals vs. Commissioner of Central Excise** reported in **(2006) 5 SCC 208**. Similarly, resort to residual entry can only be done as a last resort and the residuary clause can be invoked only if the department can establish that the goods in question can, by no conceivable process of reasoning, be brought under any of the tariff items. Reliance in this regard can be placed on **A.R. Thermosets (Pvt.) Ltd. (supra)**, **Hindustan Poles Corporation (supra)**, **Dunlop India (supra)** and **Mauri Yeast India Pvt. Ltd. (supra)**. The reliance placed by the Tax Board on Co-ordinate Bench judgment of **Pepsico India Holding (S.B. STR No. 194/2009; decided on 22.12.2016) (supra)** is onerous for the simple reason that the Co-ordinate Bench had classified the goods in the more specific entry, especially after observing that the goods in question can technically be considered namkeen. Merely because the specific entry of 'preserved food articles' did not transition from RST Act to RVAT Act is no reason to automatically place the goods in question in the residual entry. In these circumstances, the correct approach would have been independent analysis of the relevant entries under the RVAT Act and examining whether the Revenue had discharged its onus to establish that the goods in question cannot, by any conceivable means, be included in any of the specific entries. Accordingly, the conclusion of the Tax Board, to the extent that it is based on Co-ordinate Bench judgment of **Pepsico India Holding (S.B. STR No. 194/2009; decided on 22.12.2016) (supra)** cannot be sustained.

10. The next issue which falls for consideration of this Court is whether the Revenue has successfully discharged its onus to establish that the goods in question cannot be placed in any specific entry and had to be placed in the residual entry. The Tax Board held that since the goods in questions are snacks, which do not find its place in any specific entry, the same had to be placed in residual entry. However, this conclusion of the Tax Board, in the opinion of this Court, is not supported by any cogent reason or evidence for the following reasons:

10.1. It is noted that the Revenue neither sought any technical / expert opinion, nor brought any evidence on record to prove their point. It appears that the Tax Board merely relied on a basic Google search result wherein the goods in question were described as namkeen snacks.

10.2. Reliance was also placed by the Tax Board on the description of Cheetos as snacks by the global website of petitioner-assessee. However, this Court is satisfied with the explanation put fourth by learned counsel for the petitioner-assessee that as the petitioner-assessee is a part of a global conglomerate having international presence, the description of Cheetos as snack by global website of the petitioner-assessee would not preclude the categorization of the same as ‘namkeen’ in India, especially considering that namkeen, in essence, is also a snack. However, it is clarified that not all snacks would be considered as namkeen.

10.3. The Tax Board also ignored the ordinary definition of namkeen, specification of namkeen as set out by the Bureau of

Indian Standard and the FSSAI licenses granted to the petitioner-assessee, which categorizes the product in question as namkeen. As per the Apex Court judgments of **Parle Agro Pvt. Ltd. (supra)**, **Hindustan Lever Ltd. (supra)**, and **Muller & Phillips (India) Ltd. (supra)**, reliance can and should be placed on relevant food laws to determine the classification of food products.

10.4. The Tax Board also arrived at the conclusion that the goods in question are snacks based on a mere reading of the ingredients. This conclusion of the Tax Board, solely on the basis of ingredient, is *ex facie* fallacious and bereft of any reasoning. It is also contrary to the Apex Court judgment of **Frito Lays India (supra)** and order of CESTAT New Delhi in **Pepsi Foods Ltd. (supra)**, which has been affirmed by the Apex Court. Though the said judgments pertains to Excise Law, the same can be relied upon to ascertain the basic characteristic of the goods in question.

11. The reliance placed upon judgment of this Court in the case of **M/s Compuage Infocom Limited (supra)** by learned counsel for the respondent-revenue, to contend that the subsequent Notification dated 14.07.2014 would reveal the intention of Legislature to place the goods in question in Schedule V, is also misplaced as the Notification dated 14.07.2014 substituted the Schedule V to the RVAT Act and that substitution was prospective and could not be given retrospective effect, as per Apex Court judgment of **M/s L.R. Brothers Indo Flora Ltd. (supra)**. Even otherwise, as per settled position of law, an amendment in revenue matters can be given retrospective application only when the same is beneficial to the assessee and

not otherwise. Reliance in this regard can be placed on Apex Court judgment of **Suchitra Components Ltd. vs. Commissioner of Central Excise, Guntur** reported in **(2006) 12 SCC 452**.

12. In view of the foregoing analysis, considering that the Revenue and all the authorities below have misinterpreted the Co-ordinate Bench judgment of **Pepsico India Holding (S.B. STR No. 194/2009; decided on 22.12.2016) (supra)**; that Revenue has failed to discharge its onus to establish that the goods in question would fall in general/residual/orphan entry and not the specific entry; that no cogent reason has been assigned to hold the goods in questions as 'snacks'; that the goods in question have been classified as namkeen as per the FSSAI license; that the goods in question have been held to be namkeen by Apex Court in **Frito Lays India (supra)** and **Pepsi Foods Ltd. (supra)**, this Court is inclined to answer the questions of law framed herein-above in favour of the petitioner-assessee and against the respondent-revenue.

13. Accordingly, all these STRs are allowed. The order impugned of the Tax Board and the authorities below are quashed and set aside.

14. Pending application(s), if any, shall stand disposed of.

(SAMEER JAIN),J

ANIL SHARMA /70-73