

State Of Odisha vs M/S. Hindustan Coca-Cola on 27 February, 2023

Author: Murahari Sri Raman

Bench: Murahari Sri Raman

IN THE HIGH COURT OF ORISSA : CUTTACK.

STREV No. 26 of 2017
with
STREV Nos. 23, 24 and 25 of 2017
(Applications under Section 24
of the Odisha Sales Tax Act, 1947)

State of Odisha
represented by
the Commissioner of Sales Tax
Baniyyakar Bhawan
Buxibazar, Cuttack ... Petitioner

VERSUS

M/s. Hindustan Coca-Cola
Beverages Pvt. Ltd.
Plot No.60, Khurda Industrial Estate
Khurda - 752 055 ... Opposite party

Advocates appeared in the case:

For the Petitioner : M/s. Susanta Kumar Pradhan
and Sunil Mishra,
Additional Standing Counsel
(Commercial Taxes)

For the Opposite party : M/s. Monish Panda,
Anup Narayan Mohanty,
Aditya Singh Mohanty,
Advocates

CORAM:
THE CHIEF JUSTICE
JUSTICE MURAHARI SRI RAMAN

Date of Hearing: 07.02.2023 ::
STREV Nos.26 with 23, 24 & 25 of 2017

Date of Judgment: 27.02.2023
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JUDGMENT

MURAHARI SRI RAMAN, J.--

1. Challenge is laid to the common Order dated 18.02.2017 passed by the Odisha Sales Tax Tribunal in Second Appeal bearing Nos. 1449 of 2003-04, 675 of 2004-05, 735 of 2005-06 and 677 of 2006-07 directed against the Orders dated 07.07.2003, 16.03.2004, 07.05.2005 and 16.05.2006 passed by the Assistant Commissioner of Sales Tax, Puri Range, Bhubaneswar in First Appeal bearing Nos. AA-280/BH-I of 2002-03, AA-225/BH-I of 2003-04, AA-336/BH-I of 2004-05 and AA-202/BH-I of 2005-06 in connection with Assessments framed under Section 12(4) by the Taxing Authority, Bhubaneswar-I Circle, Bhubaneswar vide Orders dated 30.11.2002, 17.10.2003, 13.12.2004 and 20.01.2006 for the Assessment Years 2001-2002, 2002-03, 2003-04 and 2004-05 respectively by way of sales tax revision petitions under Section 24 of the Odisha Sales Tax Act, 1947.

1.1. Since common questions of law are involved in the present cases, they are taken up for analogous hearing and disposed of by this common Judgment.

1.2. In the afore-noted revision cases, the aggrieved, State of Odisha represented by the Commissioner of Sales Tax, Odisha, has posed following questions of law for adjudication by this Court:

A. Whether on the facts and in the circumstances of the case, "KINLEY WATER" sold by the opposite party-company falls within the scope of Entry No.4 of Taxable List?

B. Whether on the facts and in the circumstances of the case, the Odisha Sales Tax Tribunal was not justified in ignoring to take into account the material placed before it by the Revenue to show that the opposite party-dealer sold "KINLEY WATER", i.e. "aerated water" which does not fall within the ambit of Entry 39 of Tax-free List and, thereby the conclusion arrived at by said Tribunal is perverse?

C. Whether on the facts and in the circumstances of the case, the learned Odisha Sales Tax Tribunal should not have granted relief to the opposite party-dealer in view of law laid down in Mafatlal Industries Ltd. Vrs. Union of India, (1998) 111 STC 467 (SC), inasmuch as the dealer had collected sales tax from its customers/consumers?

D. Whether on the facts and in the circumstances of the case, the finding of fact by the learned Odisha Sales Tax Tribunal is based on no evidence and/or erroneous appreciation of evidence and the conclusion arrived at by the Tribunal is untenable in the eye of law?"

1.3. On 07.02.2023, this Court heard the arguments advanced by Sri Susanta Kumar Pradhan, learned Additional Standing Counsel (Commercial Taxes) appearing for the petitioner-State of Odisha and Sri Monish Panda, learned Advocate for the opposite party-company and permitted both the parties to file written note of submission. Accordingly, written notes of submission have come to be filed by Sri Monish Panda and Sri Anup Narayan Mohanty, learned counsel for the opposite party-company on 13.02.2023 and Sri Sunil Mishra, learned Additional Standing Counsel (Commercial Taxes) on 16.02.2023.

1.4. Though the petitioner has raised as many as four questions of law in the petition for revision being STREV No.26 of 2017, by filing written note of submission, the Revenue has confined its arguments to question No.A extracted herein above. Though many other questions, besides question akin to question No.A above, are raised in other petitions [vide STREV No.23 of 2017], neither the same are argued nor are they agitated in the written note of submission. This Court deems that the questions of law as "not pressed" and, therefore, declines to answer said questions.

1.5. It is worth noticing that vide Order dated 28.03.2019 this Court was pleased to accept the following question to be addressed:

"On going through the record, it seems that one issue which is required to be determined by this Court is whether the tax, which has already been collected by the assessee, can it be allowed to be retained by it in view of his change of opinion from Entry Serial No.4 of List C of the Rate Chart under the OST Act to Entry at Serial No.39 of the List A of the Rate Chart under the OST Act?"

1.6. However, subsequently both the parties abandoned such question for adjudication, rather both the parties sought for a decision on the following issue which is stated vide Order dated 10.01.2023:

"2. The Court has been shown by Mr. Monish Panda, learned counsel for the Opposite Party copies of the relevant provisions of the Bureau of Indian Standards specifications regarding Packaged Drinking Water (Other than Packaged Natural Mineral Water) as well as a copy of the Food Safety and Standards (Food Products Standards and Food Additives) Regulations, 2011 which contain a specific definition of 'Mineral Water'. It is submitted by Mr. Panda, that the Opposite Party's product is only packaged drinking water and not natural mineral water in terms of the above definitions and specifications.

3. Copies of the above documents have been handed over to learned counsel for the Department who needs some time to examine them and make submissions."

1.7. On the basis of arguments advanced by the counsel for rival parties with reference to the written notes of submission filed by respective parties, this Court frames the following question of law for rendering decision in the sales tax revision petitions being STREV Nos. 23-26 of 2017:

"Whether on the facts and in the circumstances of the case, "KINLEY WATER" sold by the opposite party-Hindustan Coca-Cola Beverages Pvt. Ltd. falls within the scope of Entry No.4 of Taxable List so as to attract levy of sales tax @ 12%?"

Fact of the case:

2. Shorn off irrelevant detail of fact, suffice it for the purpose of present case to describe that the opposite party-Hindustan Coca-Cola Beverages Pvt. Ltd. claimed exemption in respect of sale of "packaged drinking water" which was sold in the brand name "KINLEY WATER" treating the same

as embraced within the meaning of entries in Serial No.39 of Schedule of Goods declared Exempted from levy of sales tax (for short herein after referred to as "Tax-free List").

2.1. Since common question of law has been raised, the finding and observation rendered in Appellate Order dated 16.05.2006 passed in AA-202/BH-I/2005-06 by the Assistant Commissioner of Sales Tax (Appeal), Puri Range, Bhubaneswar in connection with Assessment framed under Section 12(4) of the OST Act the Year 2004-05 vide Order dated 20.01.2006 of the Taxing Authority, Bhubaneswar-I Circle, Bhubaneswar is taken as the lead case for discussions for convenience.

2.2. In the assessment for the Year 2004-05 under Section 12(4) of the Odisha Sales Tax Act, 1947 (for brevity, "OST Act"), the Assessing Authority rejected such claim of exemption by holding as follows:

"*** Further the dealer has claimed deductions of Rs.48,82,97,648.82 and Rs.67,49,490.23 towards sale of tax exempted aerated water manufactured in its unit and resale of packaged drinking water respectively. *** From the wrapper itself it is evident that the ingredients of the products are treated water, minerals (sodium chloride, magnesium sulphate). So the water sold by the dealer is nothing but the water mixed with the dissolved common salt and magnesium salt to come under the nomenclature of mineral water. In common parlance too the water sold by the dealer is treated as mineral water. Besides it is evident from the official record that during the year 2002-03 the dealer has collected OST @ 12% on the instant product by treating the same as mineral water. ***"

2.3. Aggrieved by such disallowance of exemption as claimed, the dealer-company approached the First Appellate Authority under Section 23(2) of the OST Act. With regard to aforesaid claim, the Appellate Authority has stated thus:

"**** On examination of the accounts produced the Assessing Officer did not accept the claim of the appellant towards tax-free sale of packaged drinking water in the brand name of KINLEY for Rs.67,49,490.23, claim of Rs.14,83,74,260/- towards wear and tear charges and claim of sale of exempted goods for Rs.48,82,97,648.82 under IPR, 1996 (New Unit). As to the first aspect it is seen that the ingredients for manufacture of packaged drinking water are treated water, minerals (sodium chloride, magnesium sulphate). The wrapper used on the bottles also disclosed the same ingredients as treated water, minerals (sodium chloride, magnesium sulphate). As the definition of mineral water it reads as water naturally or artificially impregnated with dissolved salts. So the water sold by the appellant in bottles are mixed with the dissolved common salt and magnesium salt and hence it is nothing but mineral water. Hence the contention of the appellant that their products are packaged drinking water but not mineral water is not acceptable and the Assessing Officer has rightly held that the KINLEY WATER is mineral water exigible to tax @12%."

2.4. Dissatisfied with disallowance of claim for exemption in respect of sale of KINLEY water, the opposite party-company carried the matter to the learned Odisha Sales Tax Tribunal in Second Appeal under Section 23(3) of the OST Act which was registered as S.A. No.677 of 2006-07.

2.5. The learned Odisha Sales Tax Tribunal insofar as the present context of KINLEY water is concerned observed as follows:

"10. Assessment year 2004-05 In course of assessment proceeding it is noticed that the dealer-company has claimed Rs.67,49,490.23 towards sale of tax free water in the brand name of KINLEY and the dealer-company has submitted that the product i.e. KINLEY is nothing but natural water and does not come under the purview of mineral water. But the learned STO did not accept the claim of appellant and treated the same as mineral water and added the amount to the taxable turnover.

27. Coming to the dispute relating to disallowance of the sale of packaged drinking water in the brand name of KINLEY from the exempted turnover and taxing the same @12%. In the present case the appellant during the assessment years 2001-2002, 2002-2003, 2003-2004 and 2004-2005 inadvertently paid tax on the sale of KINLEY water under a bona fide mistake of law. But the moment come to the knowledge of the appellant that Entry No.39 is there, in the rate chart under Orissa Sales Tax Laws, he filed revised return adhering to the provisions available under the Orissa Sales Tax Act. There is catena of decisions where delayed filing of revised returns have been accepted. Hence, this cannot be ground raised by the revenue for disallowance essential on our part to appreciate the details under the Entry No.39 of List-A and Entry No.4 of List 'C' of the rate chart under Orissa Sales Tax Laws:

Entry SI.No.39 of List-A:

'Water but not aerated or mineral water sold in bottle or sealed containers'.

This entry clearly speaks that it includes water sold in bottles or sealed containers but not aerated or mineral water. That means it is say that the drinking water which is not aerated or mineralised with specific minerals as the specific gases used for aerating water, WATER under this Entry which is tax-free.

28. Entry in Sl.No.4 of List 'C' 'Aerated or mineral water sold in bottles or in sealed containers'.

It speaks that only the specially treated water either by addition of a specific gas or a specific mineral when sold in bottles or sealed containers comes under this entry and taxable @12% under the Orissa Sales Tax Act. It is clear from the contention of the dealer-company is that Para 3.2. of Indian Standard on packaged drinking water (other than Packaged Natural Mineral Water) specification

and Para A-32 and A-33 of the prevention of Food Adulteration Rules, can be appreciated with regard to submission of the dealer and it will suffice to say that on the basis of standard prescribed by the Bureau of Indian Standard and Prevention of Food Adulteration Act and Rules, KINLEY water in the packaged drinking water coming under exempted List under Orissa Sales Tax Act. The learned counsel for the dealer company referred to the decision of Rajasthan High Court in the matter of Assistant Commercial Tax Officer Vrs. Nalavya Agencies. In view of this, KINLEY water is not aerated water because it is neither carbonated adding carbon dioxide nor treated with any aerating gases creating effervesce as normally found in case of soft drinks sold in the market and also it is not mineral water because it is neither added with specific mineral like iron nor with ianium to make it enriched with mineral as normally found in case of common salt enriched with added minerals sold in the market. Moreover, KINLEY water fulfils the criteria of packaged drinking water to be classified under Entry-39 of List-A of Rate Chart under the OST Act as the label itself shows and packaged in the bottling plant to provide hygienic and safe drinking water to the customers. In view of settled law, we do not see any ineligibility in the ground pressed by dealer-company on the score of disallowance of sale of packaged drinking water in the brand name of 'KINLEY' from the exempted turnover and taxing the same @12%. Thus, grounds taken by the revenue for 2001-02, 2002-03, 2003-04 and 2004-05 merits no consideration."

2.6. The State of Odisha-Commissioner of Sales Tax, therefore, preferred revision invoking provision for further proceeding under Section 24 raising question of law on the ground that the learned Odisha Sales Tax Tribunal erroneously decided the issue.

Argument(s) advanced by the learned Counsel for Hindustan Coca- Cola Beverages Pvt. Ltd.:

3. The manufacturing process adopted by the company for preparing "packaged drinking water" potable drinking water is used as base and it is put through the Double Reverse Osmosis process (RO) for treating and purifying water. The double RO process also eliminates pesticides at PPT levels (parts per trillion). During the osmosis process some of the mineral salts present in water also gets removed which impacts the taste profile of water. For improving taste, mineral salts are required to be added back to the filtered and purified water as per standards laid down by then prevailing Prevention of Food Adulteration Act, 1954 (now, the Food Safety and Standards Act, 2006). The entire process was undertaken as per the standards prescribed by Bureau of Indian Standards during the period in question. The company is required to follow scrupulously the mandatorily prescribed standards as per Bureau of Indian Standards which are issued by the Ministry of Consumer Affairs. The Bureau of Indian Standards governing "packaged drinking water" during the material period is covered under "IS 14543:2004" which prescribed that "water derived from any source of potable water which is subjected to various treatments as decantation, filtration, demineralization, re-mineralisation, reverse osmosis, etc.".

3.1. In terms of standards prescribed in the Bureau of Indian Standards of 1992 as revised in the year 1998, "packaged natural mineral water" is obtained directly from natural and drilled sources from underground water bearing strata for which all possible precautions is required to be taken within the protected perimeters to avoid any pollution of, or external influence on, the chemical and physical qualities. It is characterized by its content of certain mineral salts and their relative

proportions and the presence of trace elements or other constituents. It is sourced from natural sources of water and is characterized by content of certain mineral salts in them. Further, such water is collected under condition which guarantees the original microbiological purity and chemical composition of essential components. It is not subjected to treatment other than those permitted by this standard.

3.2. Stating the process thus, it is argued by Sri Monish Panda, learned counsel for the company that the item sold in the market is "packaged drinking water" and it is required to maintain "the original microbiological purity and chemical composition of essential components" in conformity with mandatory requirement. It is, thus, urged that had the item so marketed is treated as "mineral water" across India rather than "packaged drinking water", the company would have violated the standards prescribed by the Bureau of Indian Standards and under the Prevention of Food Adulteration Act, which activity visits penal consequences under said statute.

3.3. Analysing further, Sri Panda submitted that three different kinds of water, namely aerated water, mineral water and water are contemplated in Entry 39 of Tax-free List and Entry 4 of Taxable List and the words "in bottles or in sealed containers" used therein obviously means "packaged form". In absence of definition of the terms, in view of principles laid down in Akbar Badruddin Jiwani Vrs. Commissioner (Customs), 1990 (47) ELT 161 (SC) [paragraphs 53 and 55]; and CCE, Kanpur Vrs. Krishna Carbon Paper Co., 1988 (37) ELT 480 (SC) [paragraph 11], they are to be understood in common sense or commercial parlance; in contrast with scientific or technological meaning attributed to it. Added to such interpretation with regard to classification of commodity, drawing distinction between the prices of "mineral water" and "packaged drinking water", the learned counsel submitted that the price of former is much higher than the latter one.

3.4. In such view of the matter, Sri Monish Panda submitted that "packaged drinking water" sold by the company under brand name KINLEY WATER does fall within the ambit of Entry 39 of the Tax-free List and not Entry 4 of the Taxable List.

Argument(s) advanced by the Additional Standing Counsel:

4. Sri Susanta Kumar Pradhan, learned Additional Standing Counsel (Commercial Taxes) attempted to justify the stance of the Revenue by referring to the information available on the web- portal of the company which mentions that "every drop of KINLEY goes through a rigorous and intensive 10-step purification process with various stages of filtration, disinfection and mineralization" and demonstrates that "in the nutritional information of KINLEY water the ingredients of the said water are treated water, salt of sodium and magnesium". Therefore, Sri Pradhan contended that the subject-commodity is nothing but mineral water and would be within the ken of Entry 4 of List of Goods subject to Levy of Sales Tax (in short, "Taxable List") attracting levy of tax @ 12%.

4.1. Amplifying by way of written note of submission, it is stated by the learned Additional Standing Counsel that though the description of KINLEY WATER in the web-portal informs that "the process involves disinfection, sand filtration, activated carbon filtration, 10-micro polishing filtration, reverse osmosis, 5-micro polishing filtration, mineral dosing and ozone filtration" coupled with

removal of "trace compounds like carbonates, bicarbonates, chlorides, sulphates, phosphates, nitrates, calcium, magnesium, sodium, potassium, iron and manganese from the water", it is evident from nutritional information as already mentioned that KINLEY water is mineral water sold in bottles or sealed containers.

4.2. In the written note the Revenue has clarified as follows:

"In this context, it is pertinent to place before this Hon'ble Court the nutrition the label of KINLEY WATER in the following manner:

| | | |
|--------------|---|--------|
| Energy | : | 0k Cal |
| Carbohydrate | : | 0g |
| Sugar | : | 0g |
| Protein | : | 0g |
| Fat | : | 0g |
| Sodium | : | 0.3mg |
| Magnesium | : | 0.1.mg |

The ingredients as shown in the label of KINLEY WATER are treated water, salt of Sodium and Magnesium. The contention of the petitioner (sic. Opposite party-company) taken in this regard is not justified."

4.3. Referring to CCE Vrs. Krishna Carbon Paper Co., 1988 (37) ELT 480 (SC) and CCE Vrs. Connaught Plaza Restaurant Pvt. Ltd., (2012) 13 SCC 639 it is argued that the process as described by the opposite party-company clearly establishes that KINLEY brand packaged drinking water is understood in common parlance as mineral water which is within the scope of exclusion clause mentioned in Entry 39 of the Tax-free List and, therefore, falls within the sweep of Entry 4 of Taxable List.

Consideration of arguments of respective parties:

5. For better comprehension, the entries as it stood at the relevant point of time are placed hereunder:

TAX-FREE LIST Sl. Description of goods No.

39. Water but not aerated or mineral water sold in bottles or sealed containers.

TAXABLE LIST Sl. Description of goods Rate of No. tax

4. Aerated or mineral water sold in bottles or in 12% sealed containers 5.1. Upon perusal of label on the body of the KINLEY water bottle sold in the market, the Assessing Authority has made the following remarks in the Order of assessment:

"Packaged Drinking Water Ingredients: Treated water, minerals (sodium chloride, magnesium sulphate). Manufactured by Himjal Beverages (P) Ltd., Plot No.7, Phase-III, IDA, Pashamylaram, Patancheru (M), Medak District, A.P., for and on behalf of Hindustan Coca-Cola Beverages Pvt. Ltd., Enkay Towers, Udyog Vihar, Phase-5, Gurgaon, Haryana-122106 under the authority of Coca-Cola Company..."

5.2. The Assessing Authority on making observation that since ingredients of the product is treated water and mineral (sodium chloride and magnesium sulphate), water sold by the dealer- company is nothing but water mixed with dissolved common salt (known in chemical jargon as "sodium chloride") and magnesium salt. Furthermore, in common parlance water as sold is understood as mineral water. Therefore, he came to conclude that the item under consideration is embraced within the nomenclature "mineral water".

5.3. Per contra, it has been urged by the learned counsel for the opposite party that the process undertaken to make the water "packaged drinking water" is nothing but water which is added with salts like sodium and magnesium. Such addition is requirement as per the specifications of the Bureau of Indian Standards and the company is to undertake the process in conformity with statutory requirement envisaged under the Prevention of Food Adulteration Act. Nevertheless, this mere addition of salt(s) would not take away the understanding of the product as "packaged drinking water" in common sense and trade parlance. The various processes employed by the company is to bring the commodity more acceptable to a section of people for drinking purposes.

5.4. On consideration of documents furnished by either side, it has come to fore that Drinks and Carbonated Beverages Sectional Committee, Food and Agricultural Division Council has specified as follows:

"In the preparation of this standard due consideration has been given to the provisions of the Prevention of Food Adulteration Act, 1954 and the Rules framed thereunder. The standard, however, subject to the restrictions imposed under this Act and Rules, wherever applicable.

In the preparation of this standard assistance has been derived from the EEC Directive, 80/778/EEC 'Council directive relating to the quality of water intended for human consumption'.

A separate standard IS 14543 : 2004 'Packaged drinking water (other than packaged natural mineral water)' has been established."

5.5. Indian Standard-- Packaged Natural Mineral Water--

Specification (Second Revision) prescribed in IS 13428 : 2005 indicates under the heading "Definition" as follows:

"3. For the purpose of this standard the following definitions shall apply:

3.1. Natural Mineral Water--

Water clearly distinguishable from ordinary drinking water because:

- a) it is obtained directly from natural or drilled sources from underground water-bearing strata for which all possible precautions should be taken within the protected perimeters to avoid any pollution of, or external influence on, the chemical and physical qualities;
- b) it is characterized by its content of certain mineral salts and their relative proportions and the presence of trace elements or of other constituents;
- c) of the constancy of its composition and the stability of its discharge and its temperature, due account being taken of the cycles of minor natural fluctuations;
- d) it is collected under conditions which guarantee the original microbiological purity and chemical composition of essential components;
- e) it is packaged close to the point of emergence of the source with particular hygienic precautions; and
- f) it is not subjected to any treatment other than those permitted by this standard.

3.1.1 Naturally Carbonated Natural Mineral Water--

Natural mineral water which, after possible treatment in accordance with 4.1 and re-incorporation of gas from the same source and after packaging taking into consideration usual technical tolerance, has the same content of carbon dioxide spontaneously and visibly given off under normal conditions of temperature and pressure.

3.1.2 Non-carbonated Natural Mineral Water--

Natural mineral water which, by nature and after possible treatment in accordance with 4.1 and after packaging taking into consideration usual technical tolerance, does not contain free carbon dioxide in excess of the amount necessary to keep the hydrogen carbonate salts present in the water dissolved.

3.1.3 Decarbonated Natural Mineral Water--

Natural mineral water which, after possible treatment in accordance with 4.1 and after packaging, has less carbon dioxide content than that at emergence and does not visibly and spontaneously give off carbon dioxide under normal conditions of temperature and pressure.

3.1.4 Natural Mineral Water Fortified with Carbon Dioxide from the Source--

Natural mineral water which, after possible treatment in accordance with 4.1 and after packaging, has more carbon dioxide content than that at emergence.

3.1.5 Carbonated Natural Mineral Water--

Natural mineral water which, after possible treatment in accordance with 4.1 and after packaging, has been made effervescent by the addition of carbon dioxide from another origin.

NOTE-- Mineral water means natural mineral water as defined in 3.1.

3.2 Packaged Natural Mineral Water--

Natural mineral water filled into hermetically sealed containers of various compositions, forms and capacities that is, suitable for direct consumption without further treatment.

4. Treatment and Handling 4.1 Treatment permitted include separation from unstable constituents, such as compounds containing iron, manganese, sulphur or arsenic, by decantation and/or simple filtration up to 0.5 microns, if necessary, accelerated by previous aeration."

5.6. The aforesaid standard prescribed in 2005 is at variance with IS 14543 : 2004. Indian Standard in respect of Packaged Drinking Water (Other than Packaged Natural Mineral Water) [Second Reprint August, 2004] specified as follows:

"3.2 Packaged Drinking Water (Other than Packaged Natural Mineral Water)--

Packaged drinking water means water derived from any source of potable water which may be subjected to treatments, such as, decantation, filtration, combination of filtration, aeration, filtration with membrane filter, depth filter, cartridge filter, activated carbon filtration, demineralization, remineralization, reverse osmosis or any other method to meet the prescribed standard and packed. It may be disinfected to a level that will not lead to harmful contamination in the drinking water. It may be disinfected by means of chemical agents and/or physical methods to reduce of the number of micro-organism to a level that does not compromise food safety or suitability. It shall be filled in sealed containers of various compositions, forms and capacities that is suitable for direct consumption without further treatment. In case remineralization is a part of the treatment process, the ingredients used shall conform to the requirements of the Prevention of Food Adulteration Act, 1954 and the Rules framed thereunder."

5.7. As this Court is concerned with Assessment Years 2001-02, 2002-03, 2003-04 and 2004-05, the Revenue having not placed on record contemporaneous material, the argument by way of written note of submission advanced by it referring to recent information available in the web-portal is inappropriate. Rather this Court prefers to consider the facts outlined by the Assessing Authority who has extracted the description from the label of KINLEY brand water as was available at the

pertinent point of time with regard to packaged drinking water. This Court, therefore, appreciates that the opposite party-company marketed the commodity in question being prepared as per standard prescribed by the Bureau of Indian Standards prior to 2005.

5.8. It is admitted by the Revenue that the dealer-company has added only sodium and magnesium salts to the treated water. The description of commodity as is given by the opposite party- company shows that the water is the potable water which is subject to treatment such as decantation, filtration, demineralization, re-mineralisation, reverse osmosis. These processes are as per the requirements of specification of the Bureau of Indian Standards as also the Prevention of Food Adulteration Act.

5.9. Various processes employed by the opposite party-company described above amount to purification of water by removal of waste and sterilization of water by ultra violet radiation. In other words, the water is made fit for human consumption without any risk or hazard. The processes required for the treatment of water for making it fit for human consumption are relative and depend upon the nature and source of the original commodity. If the opposite party is able to source water from a clean source, many of the processes are unnecessary because water in its natural form from many sources is clean and potable, which otherwise the company brings about by treatment.

5.10. In Rule 5 of the Prevention of Food Adulteration Rules, 1955 it has been spelt out that "standards of quality of the various articles of food specified in Appendices-B, C and D to these rules are as defined in those Appendices". Under Appendix-B so far as "mineral water" is concerned the following has been defined:

"A.32-

1. MINERAL WATER means includes all kinds of mineral water or mineral water by whatever name it is called and sold.

2. Description and Types of Mineral Water--

(i) Natural mineral water is water distinguished from ordinary drinking water because--

(a) it is characterised by its content of certain mineral salts and their relative proportions and the presence of trace elements or of other constituents;

(b) it is obtained directly from natural or drilled sources from underground water-bearing strata and not from public water supply for which all possible precautions should be taken within the protected perimeters to avoid any pollution of, or external influence the chemical and physical qualities of natural mineral water;

(c) of the constancy of its composition and the stability of its discharge and its temperature, due account being taken of the cycles of minor natural fluctuations;

(d) it is collected under conditions which guarantee the original microbiological purity and chemical composition of essential components;

(e) it is packaged close to the point of emergence of the source with particular hygienic precautions;

(f) it is not subjected to any treatment other than those permitted by this standard.

(ii) Naturally Carbonated Natural Mineral Water--

A naturally carbonated natural mineral water is a natural mineral water which, after possible treatment as given hereunder and re-incorporation of gas from the same source and after packaging, taking into consideration usual technical tolerance, has the same content of carbon dioxide spontaneously and visibly given off under normal conditions of temperature and pressure.

(iii) Non-Carbonated Natural Mineral Water--

A non-carbonated natural mineral water is a natural mineral water which, by nature and after possible treatment as given hereunder and after packaging taking into consideration usual technical tolerance, does not contain free carbon dioxide in excess of the amount necessary to keep the hydrogen carbonate salts present in the water dissolved.

(iv) Decarbonated Natural Mineral Water--

A decarbonated natural mineral is a natural mineral water which, after possible treatment as given hereunder and after packaging, has less carbon dioxide content than that at emergence and does not visibly and spontaneously given off carbon dioxide under normal conditions of temperature and pressure.

(v) Natural Mineral Water Fortified with Carbon Dioxide from the Source--

A natural mineral water fortified with carbon dioxide from the source is a natural mineral water which, after possible treatment as given hereunder and after packaging, has more carbon dioxide content than that at emergence.

(vi) Carbonated Natural Mineral Water--

A carbonated natural mineral water is a natural mineral water which, after possible treatment as given hereunder and after packaging, has been made effervescent by the addition of carbon dioxide from another origin."

5.11. In said Rule 5 under Appendix-B, "Packaged Drinking Water (Other Than Mineral Water)" has been defined as follows:

"A.33- Packaged Drinking Water (Other Than Mineral Water)--

"PACKAGED DRINKING WATER" means water derived from any source of potable water or sea water or underground water or surface water which may be subjected to the treatments, namely, decantation, filtration, combination of filtration, aerations, filtration with membrane filter, depth filter, cartridge filter, activated carbon filtration, demineralization, remineralisation reverse osmosis and packed. It may be disinfected to a level that will not lead to harmful contamination in the drinking water. It may be disinfected by means of chemical agents and/or physical method to reduce the number of micro-organism to a level that does not compromise food safety or suitability:

Provided that sea water, before being subjected to the above treatments, would be subjected to desalination and related processes.

It shall be packed in clean, hygienic, colourless, transparent and tamperproof bottles/containers made of polyethylene (PE) conforming to IS: 10146 or polyvinyl chloride (PVC) conforming to IS: 10151 or polyalkylene terephthalate (PET and PBT) conforming to IS: 12252 or polypropylene conforming to IS: 10910 or foodgrade polycarbonate or sterile glass bottles suitable for preventing possible adulteration or contamination of the water."

5.12. On comparison of definitions of "mineral water" and "packaged drinking water" as defined in the Prevention of Food Adulteration Rules, 1955, it is but clear that the process undertaken by the opposite party conforms to the "packaged drinking water". Mere addition of sodium and magnesium salts may not convert "water" into "mineral water" unless other ingredients as specified in the Prevention of Food Adulteration Rules, 1955 are demonstrated to be present. The Revenue has utterly failed to bring on record that the product which is sold by the opposite party does contain other contents as enumerated in Appendix-B to the said Rules. Rather the opposite party having shown to have sold "packaged drinking water" has confirmed that the product sold is not mineral water at all. Even by applying the test of commercial identity, no change is perceived in "water" and "drinking water". Notwithstanding various processes undertaken by the opposite party-company to bring into existence "packaged drinking water", it continues its identity as water, its character and use also remain the same though the quality of said water has been raised to a certain level which is more acceptable to people. If the Revenue could bring on record the fact that the product in question contained the ingredients specified for water to fall within the comprehension of "mineral water" as per A.32 of Appendix-B appended to the Prevention of Food Adulteration Rules, the matter would have been different. On the contrary, the opposite party-company having demonstrated that it has produced "packaged drinking water" in conformity with the specification of A.33 of Appendix-B of said Rules, it has discharged its onus.

5.13. The Hon'ble Delhi High Court in Bottled Water Processors Association Vrs. Union of India, 2010 SCC OnLine Del 2038, held that it is mandatory for packaged drinking water to be manufactured, sold or exhibited for sale only with a BIS Certification Mark. Packaged drinking

water has to conform to the stipulated Indian Standards Specification as per IS 14543:2004. Rule 37 of the Prevention of Food Adulteration Rules requires the label to state that it is packaged drinking water and the label shall not contain any statement, claim, design, device, fancy name or abbreviation which is false or misleading in relation to the place of origin of the drinking water. Consequently, if packaged drinking water is sold without the usage of the BIS Mark, then the offence under Section 14 read with Section 33 of the Bureau of Indian Standards Act, 1986 stands attracted, which prescribes for the punishment.

5.14. Notwithstanding such position, the objection has been raised by the learned Additional Standing Counsel to the following effect [vide Paragraph 11 of written note of submission filed by the Revenue]:

"*** The submission of the opposite party with regard to conformity with the standard issued by the BIS is nothing to do with the issues involved in the present matter. It is the duty of the opposite party to obey the directions of the Ministry of Consumer Affairs. At the same time, it has also to comply with the statutory guidelines. It cannot deny its obligation to pay due tax rate as per the statutory prescriptions."

5.15. It seems the petitioner-State of Odisha represented by the Commissioner of Sales Tax has failed to understand the purport of penal action visited with in the event there is non-compliance of statutory mandate in the Prevention of Food Adulteration Act read with the Bureau of Indian Standards Act. Such a contention/objection cannot be countenanced in law. Therefore, there is no doubt in mind to safely conclude that the product "packaged drinking water" is nothing but water sold in bottles which is encompassed within Entry 39 of the Tax-free List--

"Water but not aerated or mineral water sold in bottles or sealed container".

6. It is not in dispute and cannot be disputed that the interpretation qua classification of commodity as enunciated by the Supreme Court in Connaught Plaza Restaurant Pvt. Ltd. (supra), Akbar Badruddin Jiwani (supra) and CCE Vrs. Krishna Carbon Paper Co., 1988 (37) ELT 480 (SC) is applicable in the present context. It has been laid down that in absence of definition, the words used in the entry in schedule is understood according to common sense or bearing in mind popular meaning or in commercial parlance. The trade meaning is one which is prevalent in that particular trade where that goods is known or traded. If special type of goods is subject-matter of a fiscal entry, then that entry must be understood in that context of that particular trade. Nonetheless, resort to rigid interpretation in terms of scientific and technical meanings is to be eschewed.

6.1. In the above perspective if the product in question, i.e., "packaged drinking water" is considered, the addition of salts would not change the nature and character of water and make it mineral water. While "mineral water" offers the essential minerals that are necessary for human body, "packaged drinking water" goes through the treatment process that destroys all minerals in it. As understood commonly "mineral water" has a flavour that is distinct from that of commercial drinking water. The flavour of packaged drinking water, on the other hand, can vary depending on the quality of its

source, treatment process, and natural mineral content.

6.2. As is understood in the common commercial parlance, the commodity, "packaged drinking water" prepared in conformity with the standards prescribed and in terms of statutory requirement and sold in the market at the relevant time in the brand name "KINLEY" is not "mineral water".

6.3. In *Krishna Iyer Vrs. State of Kerala*, (1962) 13 STC 838 (Ker) it has been observed as follows:

"But it is not the dictionary meaning of the term that will invariably prevail in the construction of a statute. The rule of interpretation applicable to such cases is well recognised. It is the rule that particular words used by the Legislature in the denomination of article should be understood according to the common commercial understanding of the term used and not in their scientific or technical sense, for, as stated in *9 Wheaton U.S. 435*, the Legislature does not suppose our merchants to be naturalists, or geologists, or botanists."

6.4. Hon'ble Supreme Court in *Mukesh Kumar Aggarwal & Co. Vrs.*

State of M.P., 1988 Supp SCC 232 laid down as follows:

"In a taxing statute words which are not technical expressions or words of art, but are words of everyday use, must be understood and given a meaning, not in their technical or scientific sense, but in a sense as understood in common parlance i.e. "that sense which people conversant with the subject-matter with which the statute is dealing, would attribute to it". Such words must be understood in their "popular sense". The particular terms used by the legislature in the denomination of articles are to be understood according to the common, commercial understanding of those terms used and not in their scientific and technical sense "for the legislature does not suppose our merchants to be naturalists or geologists or botanists"."

6.5. In *Ramavatar Budhaiprasad Vrs. The Assistant Sales Tax Officer, Akola*, (1961) 12 STC 286 (SC) the Supreme Court had to decide whether "betel leaves" can be considered as vegetables and it said that it cannot be so considered and observed:

"Reliance was placed on the dictionary meaning of the word 'vegetable' as given in *Shorter Oxford Dictionary* where the word is defined as 'of or pertaining to, comprised or consisting of, or derived, or obtained from plants or their parts'. But this word must be construed not in technical sense nor from the botanical point of view but as understood in common parlance. It has not been defined in the Act and being a word of everyday use it must be construed in its popular sense meaning 'that sense which people conversant with the subject-matter with which the statute is dealing would attribute to it.'"

6.6. Test commonly applied to such cases where the statute is silent in respect of definition of a particular commodity, is how the product gets identified by the class or section of people dealing with or using the product. This is a test, which is attracted whenever a statute does not contain any definition. It is a matter of common experience that the identity of an article is associated with its primary function. When a consumer buys an article, he buys it because it performs a specific function for him. There is a mental association in the mind of the consumer between an article and the need it supplies in his life. It is the functional character of the article, which identifies it in his mind. Refer:

Madras Rubber Factory Ltd. Vrs. Union of India, 1983 (13) ELT 1566 (SC).

6.7. This Court also recognizes the concept laid down by the Hon'ble Supreme Court of India in the case of MSCO Pvt. Ltd. Vrs.

Union of India, AIR 1985 SC 76, that while construing a word which occurs in a statute or a statutory instrument in the absence of any definition in that every document it must be given the same meaning which it receives in ordinary parlance or understood in the sense in which people conversant with the subject-matter of the statute or statutory instrument understand it; it is hazardous to interpret a word in accordance with its definition in another statute or statutory instrument and more so when such statute or statutory instrument is not dealing with any cognate subject. In construing a word in an Act caution is necessary in adopting the meaning ascribed to the word in other Acts. There is a possibility of confusion being created if, without understanding the context of its setting, a word in a statute is interpreted on the basis of the meaning attributed to the same word in another statute in which it is found, as such interpretation might work for the purposes of that Act alone.

6.8. Yet, this Court in order to understand the meaning and nature of subject-commodity, proposes to refer to the meaning attached to the expressions "packaged drinking water" and "mineral water"

as specified by the Bureau of Indian Standards (BIS) and the Prevention of Food Adulteration Act ('PFA Act'). Those in the trade like the manufacturer-Hindustan Coca-Cola Beverages Pvt. Ltd. and sellers of the product have the understanding that "packaged drinking water" is different from "mineral water" in view of different standards prescribed by the BIS and in the PFA Act. Furthermore, the buyers would purchase the commodity chiefly for quenching thirst while at the same time ensuring that it is safe for drinking. Therefore, the buyer is interested in "packaged drinking water" rather than "mineral water".

6.9. In CST Vrs. Melrose Biscuit Co., (2006) 146 STC 701 (All) it has been emphasized that the item in taxing statute must be construed in the sense in which they are sold by the dealer and purchased by the customer and the words or expressions used in a notification must be construed in the sense in which they are understood by the trade and by the consumer and not by what is understood by the department.

6.10. The specifications laid in the publications of Bureau of Indian Standards are well-known in the trade and therefore, the specifications and definitions given in such publications can be considered to be an authoritative indicator of the meaning of any particular term as popularly understood in the trade and connected circles. Apart from the statutory position of the Bureau of Indian Standards, it is a matter of record that these publications result from deliberations of expert groups. In such groups the various authorities of the Government of India, representatives of private sector undertakings as well as public sector undertakings and representatives of the different manufacturing associations are involved. Therefore, the definitions given in the Indian Standards published by the Bureau of Indian Standards can be considered to be authoritative meanings of any particular term as popularly understood in the trade and connected circles. Vide *Bansal Mechanical Works Limited Vrs. Inspector of Entry Tax, Belur Railway Siding and Others*, (2003) 133 STC 497 (WBTT). It may not be out of place to have regard to the decision of the Hon'ble Supreme Court of India in the case *Commissioner of Commercial Taxes Vrs. A.R. Thermosets Pvt. Ltd.*, (2016) 94 VST 258 (SC), wherein inter alia culling out the meaning given to "Bitumen emulsion" as per Indian Standards ICS 293.08.0.20 published by the Bureau of Indian Standards, while holding that the process adopted for bringing into existence "Bitumen emulsion" from "Bitumen" there is no change in the characteristics or identity of bitumen so as to transform bitumen into a new product having an identity, characteristic and use, observed thus:

"19. At the very inception, we think it absolutely seemly to state that the nature and composition of the product or the goods and the particular entity in the classification table is important. Matching of the goods with the Entry or Entries in the Schedules is tested on the basis of identity of the goods in question with the Entry or the contesting entries and by applying the common parlance test, i.e., whether the goods as understood in commercial or business parlance are identical or similar to the description of the Entry. Where such similarity in popular sense of meaning exists, the generic entity would be construed as including the goods in question. Sometimes on certain circumstances the end use test, i.e., use of the goods and its comparison with the Entry is applied."

6.11. Considering the present case in the above perspective, the competing entries, viz., Entry 39 of the Tax-free List vis-a-vis Entry 4 of Taxable List, do not confine the item to "water" simpliciter for classification. This Court is called upon to adjudicate whether packaged drinking water sold in the brand name "KINLEY WATER" falls within the sweep of expression "water but not aerated or mineral water sold in bottles or sealed containers". The key words are "sold", "aerated water" and "mineral water". The word "sold" in the entry is indicative that it is the trade circle in which the commodity is traded or understood by the manufacturer, the trader and the consumer. In the trade "mineral water" and "packaged drinking water" are understood in the same sense in which Bureau of Indian Standards and the Prevention of Food Adulteration Act have specified/defined. Thus considered, the contention of the petitioner-Revenue deserves to be rejected.

6.12. Another significant factor which the petitioner-Revenue did not dispute is that the price of mineral water is much higher than the price at which packaged drinking water is sold in the market. This additional fact coupled with understanding of the commodity in common parlance and trade

circles, would lead to no ambiguity that water sold under the brand name "KINLEY" is nothing but "packaged drinking water".

6.13. Only conclusion that can be arrived at when Entry 39 of Tax-free List and Entry 4 of the Taxable List are pitted against each other is that what is taxable is sale of aerated water or mineral water. The scope of taxability cannot be expanded by giving the extended meaning to the excepted expressions for the purpose of narrowing down the exemption granted to "water" which falls within the ken of Entry 39 of Tax-free List.

7. The learned Sales Tax Tribunal having taken cognizance of the standards prescribed by the Bureau of Indian Standards and provisions contained in the Prevention of Food Adulteration Act, considered that KINLEY brand water does not fall within the meaning of "aerated water" in view of decision rendered by the Rajasthan High Court in the case of Assistant Commercial Tax Officer Vrs. Nalvaya Agencies, (2000) 119 STC 393 (Raj), wherein it has been held that even in the filtering process adopted in public distribution system or at different places, some gases may be used or interacted with water which does not convert the drinking water as "aerated water".

8. To understand the meaning of mineral water or other specie of water sold in the market, it is necessary to examine in the context whether the commodity sold in the market is drinking water or something more than or other than drinking water. The fallacy lies in the contention of the Revenue that the opposite party- assessee had sold mineral water inasmuch as it failed to appreciate that the processes described by the company is nothing but purification of water to make it more potable through the processes undertaken by the company for making water possible to reach at the people for safe drinking purpose.

9. The Assessing Officer and the First Appellate Authority have merely indicated their subjective view without reference to objective factors which was absolutely necessary to determine the true character of the goods sold. Under such premise, it is hard to accept the argument advanced by the counsel for the Revenue. By way of filing written note of submission, the petitioner-Revenue has accepted that "the process of KINLEY water as explained in the website is an intensive 10-step process of purification before it reaches the end consumers". It can, therefore, be culled out that the packaged drinking water sold in the brand name "KINLEY WATER" is nothing but purified water.

10. Analysing the commodity in question keeping in mind the common sense approach, trade parlance understanding and statutory specifications, this Court is left with no option but to affirm the finding of fact by the learned Odisha Sales Tax Tribunal that "KINLEY WATER fulfils the criteria of packaged drinking water to be classified under Entry 39 of List-A of Rate Chart under the OST Act as the label itself shows and packaged in bottling plant to provide hygienic and safe drinking water to the customers".

Conclusion:

11. In view of aforesaid analysis of facts, position of law as discussed supra and reasons ascribed in the foregoing paragraphs, in the result, the question, whether "KINLEY WATER"

sold by the opposite party-Hindustan Coca-Cola Beverages Pvt. Ltd. falls within the scope of Entry No.4 of Taxable List so as to attract levy of sales tax @ 12%, is answered in the negative, i.e., in favour of the opposite party-assessee and against the Revenue.

11.1. In other words, it is held that sale of packaged drinking water in the brand name KINLEY WATER falls within the expression "water but not aerated or mineral water sold in bottles or sealed containers" vide Entry No.39 of Tax-free List.

12. Consequently, the Sales Tax Revision preferred by the State of Odisha represented by the Commissioner of Sales Tax under Section 24 of the Odisha Sales Tax Act, 1947 is dismissed and thereby the Order dated 18.02.2017 passed in S.A. Nos. 1449 of 2003-04, 675 of 2004-05, 735 of 2005-06 and 677 of 2006-07 is upheld. In the circumstances, there shall be no order as to costs.

(MURAHARI SRI RAMAN)
JUDGE

(DR. S. MURALIDHAR)
CHIEF JUSTICE

Orissa High Court
27.02.2023
Aks/MRS/Laxmikant