

SEARCH:

Read:- 1. Application dated 16th June, 2005 from M/s. Associated Capsules Pvt. Ltd.

2. This office letter dated 16th January, 2006 calling the applicant for hearing on 18th January, 2006.

Heard:- Shri D. V. Shintre (STP) and Shri M. D. Deshpande (C.A) attended on behalf of the applicant.

PROCEEDINGS

(Under section 56(1) (e) of the Maharashtra Value Added Tax Act, 2002)

No.DDQ-11-2005/Adm-5/61/64/60/B-2

Mumbai, dt. 02/06/2006

This is a set of three applications posing a common question for determination. The question as well as the details could be reproduced as follows:-

I] DETAILS OF THE APPLICANT

Sr.No.	Name of the applicant	Address of the applicant	R.C.No.
1.	M/s. Associated Capsules Pvt. Ltd. [Satara]	Gat No. 322, 323, Shindewadi, Tal. Kandala, Post - Shirwal, District-Satara- 412801	412801/S/82 dated 01/04/1996
2.	M/s. Associated Capsules Pvt. Ltd. [Mumbai]	131, Kandivali Industrial Estate, Kandivali (West), Mumbai-400 067	400067/S/1 dated 01/04/1996
3.	M/s. Associated Capsules Pvt. Ltd. [Thane]	Ashagadh Dahanu Road (East), Dist. Thane- 401 602	401602/S/1020 dated 14/03/2005

II] DETAILS OF THE QUESTION POSED

Sr.No.	Name of the applicant	Commercial Invoice No. & Date	Products put up for determination
1.	M/s. Associated Capsules Pvt. Ltd. [Satara]	0903000041 dt. 24/05/2005	Empty Hard Gelatin Capsules
2.	M/s. Associated Capsules Pvt. Ltd. [Mumbai]	0902000407 dt. 14/06/2005	Empty Hard Gelatin Capsules
3	M/s. Associated Capsules Pvt. Ltd. [Thane]	0901000329 dt. 14/06/2005	Empty Hard Gelatin Capsules

As can be seen from the above tables, there is only one product “Empty Hard Gelatin Capsules” for which determination has been sought. Also, there is only one applicant having place of business at three locations. He is registered separately for each place of business. The applicant has charged sales tax @ 12.5% on the sales of the above product effected under the invoices mentioned as above. However, it is claimed by the purchasing parties that the product being drugs would fall under the schedule entry C-29 of the Maharashtra Value Added Tax Act, 2002, thereby

submitting the @ 12.5% purchasing parties having objected to the levy @ 12.5%, the applicant hereby seeks continuation of the same at the rate applicable to his product.

02. DETAILS SUBMITTED ALONGWITH THE APPLICATION

The applicant has submitted the following details alongwith the application :-

- (i) A copy of the sales invoices (one by each applicant).
- (ii) Copies of the Drug Licences issued by the Food & Drugs Administration.
- (iii) Copies of the definition of 'drug' under the Drugs & Cosmetics Act, 1940.

03. BACKGROUND OF THE CASE

The applicant is registered under the Maharashtra Value Added Tax Act, 2002. The applicant holds valid drugs licence under the Drugs & Cosmetics Act, 1940. The Food & Drugs Administration has given licence to the applicant for the manufacture of the following products:-

[1] M/s. Associated Capsules Pvt Ltd., Mumbai. :

- (1) Empty Hard Gelatin Capsule Shells
- (2) Empty Hard Gelatin Capsule Shells I.P.
- (3) HPMC Capsules

(Cellulose capsule Shells)

Brand name – Nature Caps – for exports & deemed exports

[2] M/s. Associated Capsules Pvt Ltd., Satara :

- (1) Empty Hard Gelatin Capsule Shells I.P.

[3] M/s. Associated Capsules Pvt Ltd., Dahanu, Thane :

- (1) Empty Hard Gelatin Capsule Shells – I.P.
- (2) Hard Geletin Capsule Shells
- (3) Brand Name : Nature Caps

HPMC Capsules (Cellulose Capsules)

The applicant was conveyed a prima facie view that the product would be covered by the residuary schedule entry E-1 thereby attracting tax @ 12.5%. In response to the letter, the applicant vide letter dated 08/11/2005 submitted that the products would be covered by the schedule entry C-29 for “drugs”.

04. CONTENTION AND HEARING

The case was taken up for hearing on 18th January, 2006. Shri D. V. Shintre and

Shri M. D. Deshpande attended on behalf of the

applicant has argued that the product being manufactured under a licence granted under the Drugs & Cosmetics Act, 1940 would be classified as “drugs”. It is submitted that the definition of “drugs” under the Drugs & Cosmetics Act, 1940 includes “Empty Gelatin Capsules”. During the hearing, the applicant has submitted a written submission.

The arguments put forth by the applicant in the written submission could be reproduced as follows :-

- (1) Schedule entry C-29 of the Maharashtra Value Added Tax Act, 2002 which describes “drug” is principally based on the definition of “drug” as appearing in section 3(b) of the Drugs & Cosmetics Act, 1940. The definition of “drug” is an inclusive definition and sub-clause 3 thereof includes “Empty Gelatin Capsules”.
- (2) Schedule entry C-29 of the Maharashtra Value Added Tax Act, 2002 declares that the product should be manufactured or imported in India under licence granted under the Drugs & Cosmetics Act, 1940. The applicant’s products are also manufactured under a licence issued under the said Act.
- (3) The applicant has placed reliance on the following judgments in support of his contention that the products are drugs and accordingly covered by the schedule entry C-29 of the Maharashtra Value Added Tax Act, 2002.
 - (a) B.P.L. Pharmaceuticals vs. Collector of Central Excise, Vadodara (104 STC 164) (SC)
 - (b) United Trading Agency vs. Additional Commissioner of Commercial Taxes, Zone II, Bangalore (104 STC 182 HC)
 - (c) Dabur India Limited vs. Commissioner of Sales Tax, Orissa And Others (104 STC 198)
 - (d) Khandelwal Drug Agencies vs. Commercial Taxes Officer, “E” Circle, Jaipur (104 STC 204)
 - (e) Leukoplast (India) Ltd. vs. State of Goa And Others (71 STC 180)

Relying on the above judgments, the applicant is of the view that the popular or commercial meaning of a drug is synonymous to the one given in the Drugs & Cosmetics Act, 1940. He submits that the Hon. Supreme Court in the case of BPL Pharmaceuticals Ltd and United Trading Agency has adopted and accepted the principle that, if the product is manufactured under the licence granted under the Drugs & Cosmetics Act, 1940, the same may be treated as a “drug/medicine” either under Excise Act or Sales Tax Act.

He further submits that the tests applied by the Hon. Supreme Court, other High Courts and Bombay High Court (Panaji Bench) are binding and need to be followed respectfully in the present case.

In respect of the argument as regards interpretation of a taxing statute, the applicant has placed reliance on the following judgments :

1. Collector of Customs & Central Excise And Others vs. Lekhraj Jessumal & Sons And Another (101 STC 480 S.C.)
2. State of West Bengal And Others vs. Anil Krishal Paul (88 STC 337 West Bengal)
3. M/s. B & V Agro Irrigation Co. (Appeal No. 65 of 1996 dt. 16/12/2000)

The applicant submits that the present case is also based on the principles of referential legislation and the wording “drugs/medicine/medicinal products” be given the same meaning as defined/assigned to the product in the Drugs & Cosmetics Act, 1940. He further submits that when there is a Central enactment which covers the subject referred in the State Act, the definition under the Central Act must prevail over the State Act, and therefore, it is necessary to give the same meaning to the word drug/medicine/medicinal product as so defined, understood under the Central Act. In the present case, according to the applicant, the provisions of the Drugs & Cosmetics Act, 1940 must prevail over the provisions of the Maharashtra Value Added Tax Act, 2002.

In view of the above arguments, the applicant prays that the product be declared as a “drug” covered by the schedule entry C-29 of the Maharashtra Value Added Tax Act, 2002.

05. OBSERVATIONS

I have gone through all the facts of the case.

The applicant is manufacturer of ‘Empty Hard Gelatin Capsules’. The applicant’s contention is that the product “Empty Hard Gelatin Capsule” is covered by the schedule entry C-29 of the Maharashtra Value Added Tax Act, 2002. He has placed reliance upon the definition of ‘drug’ as per the Drugs & Cosmetics Act, 1940 for interpreting the schedule entry C-29 of the Maharashtra Value Added Tax Act, 2002 which pertains to drugs. Hence, let me have a look at the schedule entry C-29 as well as the definition of ‘drug’ as per the Drugs & Cosmetics Act, 1940.

Definition of ‘drug’ as per section 3(b) of the Drugs & Cosmetics Act, 1940

“drug” includes --

- i) all medicines for internal or external use of human beings or animals and all substances intended to be used for or in the diagnosis, treatment, mitigation or prevention of any disease or disorder in human beings or animals, including preparations applied on human body for the purpose of repelling insects like mosquitoes.
- ii) such substances (other than food) intended to affect the structure or any function of the human body or intended to be used for the destruction of vermin or insects which cause disease in human beings or animals, as may be specified from time to time by the Central Government by notification in the Official Gazette.
- iii) all substances intended for use as components of a drug including empty gelatin capsules; and
- iv) such devices intended for internal or external use in the diagnosis, treatment, mitigation or prevention of disease or disorder in human beings or animals, as may be specified from time to time by the Central Government by notification in the Official Gazette, after consultation with the Board;

Schedule entry C-29 of the Maharashtra Value Added Tax Act, 2002

Schedule entry No.	Description	Rate of Tax	Date of Effect
C-29	Drugs (including Ayurvedic, Sidha, Unani, spirituous Medical Drugs and Homoeopathic Drugs), being formulations or preparations conforming to the following descriptions:- Any medicinal formulation or preparation ready for use internally or on the body of human beings, animals, and birds for diagnosis, treatment, mitigation or prevention of any diseases or disorders, which is manufactured or imported into India, stocked, distributed or sold under licence granted under the Drug and Cosmetic Act, 1940 but does not include mosquito repellants in any form.	-do-	1-5-2005 to 31-01-2006
C-29	29(a) Drugs (including Ayurvedic, Sidha, Unani, spirituous Medical Drugs and Homoeopathic Drugs), being formulations or preparations conforming to the following description:- Any medicinal formulation or preparation ready for use internally or on the body of human beings, animals, and birds for diagnosis, treatment, mitigation or prevention of any diseases or disorders, which is manufactured or imported into India, stocked, distributed or sold under licence granted under the Drug and Cosmetic Act, 1940 but does not include mosquito repellants in any form.	-do-	01.02.2006 onwards

	manufactured under licence granted under the Drug and Cosmetic Act, 1940.		
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The applicant's contention is that the product "Empty Hard Gelatin Capsule" is covered by the schedule entry C-29 of the Maharashtra Value Added Tax Act, 2002. From the above, it can be seen that clause (iii) of the definition of 'drug' as per the Drugs & Cosmetics Act, 1940 specifically includes "Empty Gelatin Capsule". The meaning of drug as per entry C-29 of the Maharashtra Value Added Tax Act, 2002 and as per Drugs & Cosmetics Act, 1940 is not identical. The entry C-29 of 'drug' under the Maharashtra Value Added Tax Act, 2002 is not a referential entry. Thus, the meaning of word 'drug' for the interpretation of entry C-29 does not depend upon the interpretation of the word 'drug' as per Drugs & Cosmetics Act, 1940. The legislature has chosen to define the meaning of 'drug' differently and independently of that of the Drugs & Cosmetics Act, 1940. There is no mention and reference to the Drugs & Cosmetics Act, 1940 in the schedule entry C-29 of the Maharashtra Value Added Tax Act, 2002.

To qualify as a drug for the purposes of schedule entry C-29, a product should satisfy all the five conditions simultaneously:-

1. It should be a medicinal formulation or preparation ready for use internally or externally on human beings, animals and birds.
2. It is used for diagnosis, treatment, mitigation or prevention of any disease or disorder.
3. It should be manufactured or imported into India.
4. It should be stocked, distributed or sold under license granted under the Drugs and Cosmetics Act, 1940.
5. It does not include mosquito repellents in any form.

Of the five conditions, the condition No. 2 pertaining to diagnosis, treatment, mitigation or prevention of any disease or disorder is the most important and decisive test.

The applicant in his written submission has pointed out the definition of drug under the Drugs & Cosmetics Act, 1940. The entry C-29 or s the case may be C-29(a) of the Maharashtra Value Added Tax Act, 2002 is not a referential entry. The entry itself defines the meaning of the word "drug" for the purposes of the schedule entry. The entry does not convey that the meaning of the word "drug" is to be derived from the Drugs Act & Cosmetics Act, 1940. Thus, the reliance of the applicant on the meaning of 'drug' as per the Drugs Act & Cosmetics Act, 1940 is relevant as far as the interpretation of schedule entry C-29 / C-29(a) is concerned.

A product to be qualified as a drug needs to fulfill the conditions and specifications as laid down in the schedule entry C-29/C-29(a) on drugs. Since a specific definition is provided by the Act itself, the resort to any other means of interpretation for the product "Drug" in considering the tax aspect is totally uncalled for.

A licence is granted to the applicant by the Food & Drug Administration. Mere possession of this licence does not confirm the view that the product of the applicant is a medicine/drug. The Schedule entry under the Bombay Sales Tax Act, 1959 is not a referential entry so as to infer that each and every product manufactured under the drug licence will automatically become a 'Drug' under the Bombay Sales Tax Act, 1959. Moreover, section 3(b) (iii) of the Drugs & Cosmetics Act, 1940 specifically includes the empty gelatin capsules as a drug. It is due to the above inclusion, the "empty gelatin capsule" is called as a drug under the Drugs & Cosmetics Act, 1940. The entry C-29 of the Maharashtra Value Added Tax Act, 2002 is thus different from the entry under the Drugs & Cosmetics Act, 1940.

As per the interpretation of our own taxing statute, a drug needs to have therapeutic characteristics and the product does not have therapeutic quality or attributes. Is the product used in the treatment of the disease or disorder of a patient?

This brings us to the next question as to **whether the product mitigates disorder or disease**. The answer is again negative. The product does not mitigate or treat diseases. Therefore, I do not agree with the submission that the product is used for mitigation, prevention or treatment of any diseases or disorder. The product does not fall in the category of drugs used for diagnosis, treatment, mitigation or prevention of

The classification of a product under the schedule entry for drugs can be done only with reference to the specific wording of the entry C-29 and the conditionalities provided therein for a product to satisfy. These conditions cannot be ignored or overlooked. The history of the entry shows that products have been considered to be drugs only when they satisfy the primary characteristics as laid down in the entry itself. In the present case, Empty Hard Gelatin Capsule cannot be considered to be a drug as it does not satisfy the essential condition of treatment and mitigation of disease and disorder.

06. The applicant has placed reliance upon the following judgments in support of his claim that the product is covered by the schedule entry C-29/C-29(a) for drugs :-

1] B.P.L. Pharmaceuticals Ltd [104 STC 164 (SC)] :

The apex court relying upon the excise classification and the meaning of drug has held that “Selsum shampoo” is a medicine under the Central Excise Tariff Act used in the treatment of dandruff, a disease known as “seborrhoeic dermatitis”.

This case pertains to the Central Excise Act. The judgment is not applicable to our case as our schedule entry is not identical to that under the Central Excise Act. Moreover, the “Gelatin Capsule” does not satisfy any of the four conditions of prevention, treatment, mitigation, and cure as laid down in the schedule entry to qualify as a drug.

2] United Trading Agency vs. Additional Commissioner of Commercial Taxes, Zone II, Bangalore (104 STC 182 HC) :

The High Court interpreted the entry of ‘drug’ for the purposes of the Karnataka Sales Tax Act. It was held that Vicco Powder/Paste/Cream etc. are medicines, since they have medicinal properties.

The product in the present case i.e “Gelatin Capsule” does not possess any such medicinal properties and hence, the ratio of the above case is not applicable.

3] Dabur India Limited vs. Commissioner of Sales Tax, Orissa And Others (104 STC 198):

The Orissa Sales Tax Act had an entry for drugs which was congruent to the definition of drugs as per the Drugs and Cosmetics Act, 1940. On this fact, the High Court has held that “Lal Dantamanjan” is a drug.

The above ratio is not applicable to our case. The entry under the Maharashtra Value Added Tax Act, 2002 is not coterminous to the definition of ‘drug’ under the Drugs & Cosmetics Act, 1940.

4] Khandelwal Drug Agencies vs. Commercial Taxes Officer, “E” Circle, Jaipur (104 STC 204):

The issue herein was whether “swad” is an ayurvedic medicine or not? The Rajasthan Taxation Tribunal held it in the negative. It was held that the product “swad” being not manufactured strictly in accordance with the formula prescribed in the First Schedule of the Drugs & Cosmetics Act, 1940, it could not be held as a drug.

The applicant has formed an opinion on the basis of the above observation that, if something is manufactured in accordance with the formula prescribed in the First Schedule of the Drugs & Cosmetics Act, 1940, then it is to be called as a drug. This point has been dealt in detail in the earlier part of this order. Only fulfilling the conditions as laid down in the schedule entry C-29 of the Maharashtra Value Added Tax Act, 2002 would make a product eligible to be called as a drug.

5] Leukoplast (India) Ltd. vs. State of Goa And Others (71 STC 180):

It was held that the products such as zinc oxide adhesive plaster B.P.C. (leukoplast), wound dressing (handy plast), belladonna B.P.C., capsicum plaster B. P. C., and cotton crepe bandages B.P. C. (leukocrepe) were drugs and medicines coming within the purview of the notifications for the purposes of the Goa Sales Tax Act.

The above notification pertained to “drugs or medicinal preparations”. The entry for drugs as per our Act is self-explanatory. To

schedule entry under the Maharashtra Act is structured differently. To interpret a product as regards its being a drug, the same has to be interpreted in terms of the entry as per the relevant Act only. Hence, this judgment would not be applicable to the present case. Also, the product put up for determination in this order is not a drug/medicine.

07. In respect of the argument as regards interpretation of a taxing statute, the applicant has placed reliance on the following judgments :

1] Collector of Customs & Central Excise And Others vs. Lekhraj Jessumal & Sons And Another (101 STC 480 S.C.):

This case pertains to the principles of interpretation of statutes. The apex court was required to decide whether “switches miniaturized” is a component part of hearing aids. The Court observed that, *“Progress cannot be stifled by an over-rigid interpretation of Import Policy or customs tariff. Both must be read as they stand on the date of importation and whatever is reasonably covered thereby must be allowed to be imported regardless of the fact that it was not in existence or even contemplated when the policy or tariff was formulated”*.

In the present case, the legislation in its wisdom has defined the meaning of drug and thus no scope for interpretation is left. The observations of the apex court are thus not relevant as far as the applicant’s case is concerned.

2] State of West Bengal And Others vs. Anil Krishal Paul (88 STC 337 West Bengal):

This case also pertains to the interpretation of statutes. The dispute pertains to the interpretation of the product “gudakhu” or “gurakhu”. It was held that the same word in the context of inter-related statutes cannot be interpreted differently.

Such are not the facts in the present case. The schedule entry for the purposes of the Maharashtra Value Added Tax Act, 2002 pertaining to ‘drugs’ has defined the meaning of ‘drugs’. Hence, there is no scope for reliance on other statutes to decide whether a product is a drug or not.

3] M/s. B & V Agro Irrigation Co. (Appeal No. 65 of 1996 dt. 16/12/2000):

In this case, the dispute pertained to the interpretation of the product ‘Agro Shade Net Fabric’.

Again, the judgment is on the interpretation of “referential legislation”. At the cost of repetition, I have to say that the entry C-29 of the Maharashtra Value Added Tax Act, 2002 is not a referential entry and hence, this judgment also cannot be made applicable to the present case.

08. The above discussion could be summarized to mean that the product “Empty Hard Gelatin Capsules” is not a drug and hence not covered by the schedule entry C-29/C-29(a) of the Maharashtra Value Added Tax Act, 2002. The product, therefore, gets placed in the residuary schedule entry E-1, thereby attracting tax @ 12.5%.

In view of the discussion held herein above, I pass an order as follows :-

ORDER

(Under section 56(1) (e) of the Maharashtra Value Added Tax Act, 2002)

No.DDQ-11-2005/Adm-5/61/64/60/B-

Mumbai,dt.

This set of three applications posing a common question for determination as regards the rate of tax applicable to the product “Empty Hard Gelatin Capsules” is herewith answered as follows :-

Sl. No.	Name of the Applicant	Commercial Invoice No. & Date	Products	Schedule entry	Rate of Tax
1.	M/s. Associated Capsules Pvt. Ltd. [Satara]	0903000041 dt. 24/05/2005	Empty Hard Gelatin Capsules	E-1	12.5%
2.	M/s. Associated Capsules Pvt. Ltd. [Mumbai]	0902000407 dt. 14/06/2005	Empty Hard Gelatin Capsules	E-1	12.5%
3	M/s. Associated Capsules Pvt. Ltd. [Thane]	0901000329 dt. 14/06/2005	Empty Hard Gelatin Capsules	E-1	12.5%

(V. N. MORE)

Commissioner of Sales Tax,

Maharashtra State, Mumbai

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