

- Read:**
1. Application dt.18.06.2006 from M/s.Cadila Healthcare Ltd. holder of TIN numbers 47800378681V (under the VAT Act)& 27800378681C (under the CST Act)
 2. This office letter dt. 30.8.07 calling the applicant to attend hearing on 11.9.07.
 3. This office letter dt. 17.9.07 calling the applicant to attend hearing on 3.10.07

Heard: Shri Nitin Shah (Chartered Accountant)on behalf of the applicant.

PROCEEDINGS

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

No.DDQ-11/2006/Adm-2/40/B-1

Mumbai, dt. 22.10.2007

An application is received from M/s.Cadila Healthcare Ltd, bearing address as "A" Shiv Sagar estate, Dr. Annie Besant Road, Worli, Mumbai -400018 , requesting determination of the rate of tax applicable to the sale of the product "Nutralite Table Margarine" evidenced by the bill invoice No.IJ0660176 dt.6.6.2006.

2. FACTS OF THE CASE

- a) M/s.Cadila Healthcare Ltd. are engaged in the business of pharmaceutical formulations and reselling of pharmaceutical products and they manufacture and market the items which are not only meant for usage of any ill human being but can also be used by the public in general, for their other than medical usage. They have sold 'Table Margarine' under trade name 'Nutralite Table Margarine' charging VAT @ 4%. It is stated to be manufactured from Vegetable Oils and in keeping with the determination order No.DDQ-1175 / 13 / B-7 dt.9.7.1975 in the case of M/s. Berar Oil Industries, the applicant maintains that the impugned margarine would be eligible to be covered by entry 100 in schedule 'C' appended to the MVAT Act, 2002 catering to "Vanaspati (Hydrogenated Vegetable Oil)". However, they have requested determination of the correct rate of tax applicable on the impugned margarine.

- b) The applicant has furnished a write-up elaborating on the manufacturing process in brief and the ingredients of the impugned margarine which is reproduced as hereunder,-

“Nutralite’ is manufactured conforming to the Prevention of Food Adulteration Rules, 1955 under the Prevention of Food Adulteration Act, 1954 (PFA Act). As per the PFA Act, 1954 it is ‘Table Margarine’. ‘Table Margarine’ means an emulsion of edible oil and fats with water. It is free from,-

- Any disagreeable odour or taste of decomposing oils and fats,
- Any mineral oil, and
- Any animal body fats.

c) In the application ‘Nutralite Table Margarine’ is described as a light yellow coloured soft solid with consistency similar to butter and is produced by emulsifying vegetable oils & fats with whey Water (the watery part of milk) using approved emulsifying agent. Both the phases, oil as well as water are heated and then mixed for a specific period. The emulsion so obtained is further chilled to solidify it and is then packed. The other ingredients used are Vitamins, anti-oxidants, stabilizing agents and flavours.

d) The ingredients of ‘Nutralite’ are Refined Vegetable Oil (main ingredient), skimmed milk powder, common salt, emulsifiers, Class-II preservatives, sequestering agents and anti-oxidants, vitamin-A not less than 301U/g., Vitamin-D2 IU/g, Vitamin-E.

e) The applicant has referred to the definition of Margarine appearing in the Prevention of Food and Adulteration Act as stated in the DDQ dt.9.7.1975 in the case of M/s.Berar Oil Industries which is reproduced as follows-

“Margarine means an article of food which resembles table (creamy) butter in consistency and appearance. It shall contain at least 80 per cent, by weight of

edible oils or a mixture of edible oil with vanaspati and not more than 5 per cent of its weight of Tin Oil, but sufficient so that when the separated fat is mixed with Refined Groundnut oil in the proportion of 20:80, the red colour produced by the Baudouin Test shall not be lighter than 2.0 red unit in a 1 cm. cell on Lovi-Bond scale. Margarine may be prepared with or without addition of edible common salt and it shall be free from rancidity, added colouring and flavouring substances, mineral oil or animal fat. Not less 25 I.U. of Vitamin 'A' shall be added to every gram of Margarine at the time of its manufacture. (Margarine may contain permitted emulsifying and stabilizing agent)".

The applicant has contended that Table Margarine has to conform to the following specification prescribed by the PFA, 1954 and their product Nutralite also conforms to the specification stated in Appendix of Annexure-I of the PFA Act. These are,-

- Fat – not less than 80% mass/mass
- Moisture – Not less than 12% and not more than 16% mass/mass
- The other excipient allowed are upto 2.5% of common salt and ingredient permissible as per PFA Rules.

The entire three ingredients put together works out to 98.5%. As per their argument, this leads to conclusion that the product largely falls in the category of edible fat of Vegetable Origin.

f) USAGE :

The end use of the product is,-

- Spreading – the product is ideal for spreading on bread and toast.
- Frying – Ideal for shallow frying or sautéing, Can be heated to a high temperature.

- Cooking – For use in the favourite recipes preparations.
- Baking – Perfect for cakes, pastries and biscuits.

As per the applicant, the product is suitable for vegetarians. As per Vegetable Oil Product Control order, 1947, the meaning of this product is assigned as 'Vegetable Oil Product'. The margarine can be produced either from Vegetable Oil or from Hydrogenated Vegetable oil."

g) The applicant has further submitted an addendum in which it is informed that the impugned margarine is non-hydrogenated one i.e. obtained without process of hydrogenation and still is identifiable as 'margarine' only.

h) The applicant has cited certain decisions and judgements in which it is held that 'Margarine' is covered by the scope of the word 'hydrogenated vegetable oil'. They are as follows :

1. Amar Sales Agency vs The State of Gujarat (SA no 199 of 1979)
2. Hiralal Datram vs The State of Gujarat (SA no 288 of 1979)
3. Thakur Liladhar Vaghajibhai vs The State of Gujarat (SA no 260 and 261 of 1979.
4. Berar Oil Industries , (DDQ-1175/13/B-7/ dt 9.7.75)

i) Further, applicant pleads that although the impugned product is a non-hydrogenated one, it is still Margarine. In case, if it is decided that if in the manufacturing process of margarine hydrogenation is done then only it is covered under the entry where 'hydrogenated word is used, then in that event, they have contended that it would be covered by the scope of the schedule entry C-107(11)(f) as " vegetable oil.' Finally, it is contended that the schedule entry C-107 (11)(f) would be applicable to the product.

3. DOCUMENTS ATTACHED WITH THE APPLICATION

1. Copy of invoice.
2. Certificate of analysis from Vaibhav Analytical Services.
3. Copies of judgements cited by the applicants.
4. Copy of the Vegetable Oil Products Control Order 1947.

4. CONTENTIONS AND HEARING

The case was fixed for hearing on 3.10.07. Shri Nitin Shah (Chartered Accountant) attended on behalf of the applicant. He stated that the product submitted for determination is " Nutralite' which is table margarine. As per his contention, table margarine is covered by schedule entry C-100 under the heading ' Vanaspati (hydrogenated vegetable oil). He cited certain decisions of the Gujarat tribunal as well as the DDQ in the case of M/s Berar Oil industries (cited supra)in which it was held that Margarine is covered by the then schedule entry for 'Hydrogenated vegetable oils'. He further informed that 'Nutralite' is not produced through the process of hydrogenation and this is done in order to keep it cholesterol-free. The usual Margarine is prepared by the addition of hydrogen to vegetable oil but in 'Nutralite' no hydrogen is added. He argued that in case the product is not found fit for coverage under C-100 , it be held as a 'vegetable oil' under schedule entry C-107. As per his contention, vegetable oil is a major ingredient of 'Nutralite' . He further stated that the other probable entry for 'Nutralite' is schedule entry C-107(11)(f) as it is covered by the expression ' food stuffs and food provisions'.

5. OBSERVATIONS

I have gone through the submissions made by the applicants and I have also closely scrutinized the various contentions made by the applicant as regards the probable schedule entries under which the product may be classified. Prior to any consideration of the schedule entries, I would first have a look at the product .The applicant sells the product under the brand name of "Nutralite'. The cover of the sample shows that it is described as 'table margarine'. The legend on the cover pronounces it as

'cholesterol free'-this attribute mainly due to the process to which the product is subjected. Unlike the usual margarine produced in the market, this Margarine is not prepared by hydrogenation of vegetable oil. It is not a *hydrogenated oil*. Complete hydrogenation converts unsaturated fatty acids to saturated ones and such hydrogenated oils carry health concerns. Hydrogenation results in the conversion of liquid vegetable oils to solid or semi-solid fats and a common example of such hydrogenated oil is the "vanaspati ghee" which is popular in India as a cheap substitute to the pure ghee. The product under consideration, however, is not 'hydrogenated vegetable oil' but is made from the emulsion of edible oil and fats with water. Besides vegetable oil, it contains skimmed milk powder, salt, stabilisers, preservatives, antioxidants and certain vitamins. As far as the uses of the product are concerned, the following are its proclaimed uses :

SPREADING	Ideal for spreading on bread and toast.
FRYING	Ideal for shallow frying or sauteing. Can be heated to a high temperature.
COOKING	For use in recipes.
BAKING	Perfect for cakes, pastries and biscuits.

Thus , a synopsis of the information submitted is as follows :

- ❖ The product is a Table Margarine.
- ❖ It is not prepared by hydrogenation of vegetable oil.
- ❖ It contains oil, skimmed milk powder, salt, stabilisers, preservatives, antioxidants and certain vitamins.
- ❖ It is used as a bread spread and is also used for frying, cooking and baking.

The constitution and the use of the product is now clear . Keeping the essential aspects in mind, I shall now proceed to consider the classification of the product with respect to the schedule entries put forth by the applicant. The first of the entries argued is schedule entry C-100 .

i) CONTENTION REGARDING SCHEDULE ENTRY C-100

C-100	Vanaspati (Hydrogenated vegetable oil)	4%
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The scope of schedule entry C-100 is very clear and definite. It includes only 'vanaspati'. The legislature goes a step ahead and makes its intention clearer by describing Vanaspati in the words 'Hydrogenated Vanaspati Oil'. Thus, amongst hydrogenated vegetable oils, only Vanaspati would fall under schedule entry C-100. 'Nutralite' does not gain coverage under the entry for two reasons:

- Firstly, it is not hydrogenated vegetable oil. As mentioned earlier, Hydrogenation is a process where the liquid vegetable oil is heated to high temperatures and a catalyst (commonly nickel, but could be palladium, platinum or rhodium) is added. Hydrogen is bubbled through the liquid. The mixture is then filtered to remove the metal, leaving hydrogenated vegetable oil. In the usual process, Water, whey, salt, vitamins, colourings, flavourings and emulsifiers may then be added to produce 'hydrogenated margarine'. The advantage of all this is that it gives a uniform product that is solid at room temperature and has a long shelf life. Nutralite is not prepared by hydrogenation in keeping with the current stress laid on healthy food habits. It is projected as a 'cholesterol free product' mainly due to its unique manufacturing process.

- Secondly, even if it had been hydrogenated, it wouldn't have stood a chance as among hydrogenated oils, only "Vanaspati" is classified under schedule entry C-100. Vanaspati Ghee as the product is called in India is a partially or fully hydrogenated vegetable oil and hydrogenation is that additional attribute which separates it from vegetable oil. Vanaspati ghee is a distinct product and is not to be confused with margarine. Though both Vanaspati and margarine (not

'Nutralite) is produced by hydrogenation, *both are not identical*- a fine line distinguishes them.

ii) CONTENTION REGARDING SCHEDULE ENTRY C-102

Now that I have considered the probability or rather the improbability of schedule entry C-100, I would move on to the schedule entry C. The representative of the applicant had emphasized on the inclusion of the product under this schedule entry and therefore a close look at it becomes essential.

C-100	Vegetable oil including gingelly oil, castor oil, and bran oil	4%
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The schedule entry C-102 covers 'vegetable oils'. Is the product a 'vegetable oil? I would say 'no' and for valid reasons. Vegetable oils, both edible and inedible oils are obtained from plants. As we are here dealing with an edible product, I would consider only the relevance of edible vegetable oil. The applicant has contended that as 'Nutralite' is used for the same purposes as a vegetable oil and contains a high percentage of vegetable oil, it should be held as a vegetable oil. I differ with this. While not denying the substantive 'oil' base of the product, it is equally undeniable that the product is not a vegetable oil simpliciter. A housewife would associate groundnut oil, rice bran oil or coconut oil with edible oils but she would certainly not associate 'Margarine' with edible cooking oil.. The advocate has based his arguments on the uses of the product which are similar to that of an oil but I cannot buy this argument, howsoever attractive it may sound. The product may be used as a cooking medium and like oils, can be heated to a high temperature but this does not necessarily make it an edible oil. Why is it so? Let us see.

- First and foremost, *it is obtained from oil-it is not oil itself*. This makes it a vegetable oil based product and not a vegetable oil. The applicant himself says so. On his main submission he says," as per the Vegetable Oil product Control Order, 1947 the meaning of this product is assigned as '**vegetable oil product**'.

- Secondly, the company projects the product as 'table margarine'. Table margarine is that type of margarine which is *mainly* used as spreads on bread. In the western world, margarine is labeled as a poor man's butter as due to the salt content and the milk powder as well as the vitamins contained in it, it is directly consumed. *However, vegetable oil is not consumed directly- it is a cooking medium. Nor is it used as spreads like 'Nutralite'.*
- Thirdly, Nutralite can be used as a bakery agent. Nutralite is used both as a cooking media and a bakery agent but the converse is not true for a vegetable oil. Vegetable oils cannot be used in baking.
- Fourthly, the schedule entry C-102 simply reads as 'vegetable oil'. A plain reading of the entry shows that what was contemplated by the legislature in drafting this entry is to bring all 'vegetable oils' under the umbrella of schedule entry C-102. There seems to be no intention of bringing 'vegetable oil based products or vegetable oil substitutes' under its purview.
- Lastly, *what I would emphasise here is that the meaning and the scope of the term 'vegetable oils' should be limited to those oils which are considered in common parlance to be vegetable oils.* This is because, we are dealing with a product which is a culinary item of everyday use. Therefore, things being as they are, delving into technicalities is unnecessary as well as irrelevant. The judgement of the **Supreme Court** in the case of M/s Ramavtar Budhiprasad (**12 STC 286**), though old and often-quoted, remains as pertinent as relevant even in these changing times. In this case, the Court had to decide whether 'betel leaves' is a vegetable. While holding that 'betel leaves' is not vegetable, the Court expounded the principle of the 'common parlance test'. While holding that reliance should not be placed on the dictionary it held ,"

'But this word (betel leaf) must be construed not in the 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 the popular sense.'

'It held that though technically a betel leaf is a plant or a vegetable , in common parlance it is not viewed as a vegetable. If one wants vegetables one would not buy betel leaves. In the same way if one wants vegetable oil , one would not buy 'Neutralite'. Neutralite may be made of vegetable oil and may share some uses with the vegetable oil but it is not a 'vegetable oil' as it is not understood in common parlance as a vegetable oil.

For the reasons cited aforesaid, I find it unable to agree with the applicant that the product is a 'vegetable oil'. I now proceed to the schedule entry C-107 (11) (f) and will now consider whether the product fits into the requirements of that entry.

iii) CONTENTION REGARDING SCHEDULE ENTRY C-107(11)(f)

C-107(11)(f) Food stuffs and Food provisions of 4%
all kinds including raw, semi-cooked or semi-processed foods, ready to mix and ready to cook preparations *excluding ready to serve foods.*

Explanation : The items referred to in clause (a) to (f) will not be covered by the scope of this entry *when those are served for consumption*

The schedule entry for foodstuffs and food provisions is a wide entry including raw, semi-cooked or semi-processed foods, ready to mix and ready to cook preparations. But this entry comes with an exclusion clause which is sweeping in its ambit. It specifically excludes the category of 'ready to serve foods' i.e food which is ready to eat. Here, the allusion to ready-to-serve foods should be construed as food which is ready to eat where nothing more needs to be done to make it ready for the

table. Such foods are specifically excluded from the purview of schedule entry C-107(11)(f) .

Also, the products which are specifically mentioned under the entry belong to a specific category and thus speak for themselves. They are :

- Raw foods
- Semi-cooked foods
- Semi-processed foods
- Ready-to-mix foods
- Ready-to cook foods

The common factor in the genres listed above is that *all these foods are not ready-to-eat foods and some process needs to be done on them to make them ready for consumption. This observation is corroborated by the fact that the entry specifically excludes ready-to-serve foods.* The specie of ready-to-eat foods or ready -to-serve foods does not belong to the genus of 'raw, semi-processed, semi-cooked foods. 'Nutralite' is table margarine. It is not a 'raw, semi-processed, semi-cooked, ready-to-mix or ready-to-cook food'. Nothing needs to be done to "Nutralite' in order to make it palatable. It is a 'ready-to-serve food' and therefore ,it would not come under schedule entry C-107(11)(f).

The DDQ in the case of M/s Parampara Food products (No.DDQ-11-2005/Adm-5/76/B-3 dt .31.5.07) had to decide whether ready-to-eat foods like Rajma, Chicken masala would be covered by the schedule entry C-107(11)(f).These foods came in polythene packs and in order to make them ready to eat they had to be kept in boiling water for some time. The Commissioner held that these foods were 'ready to serve foods' as nothing substantial had to be done to make them ready for consumption. Similarly, in the instant case the "Margarine' is a ready to serve food. It is ready for application on the bread as it is primarily a bread spread. In the West, unlike in India, eating table margarine on bread is a usual breakfast practice and it is viewed as a

substitute for butter. Thus, keeping the above principles in mind, I have no hesitation in holding that 'Nutralite' is not qualified for coverage under schedule entry C-107(11)(f).

A plain reading of schedule entry C-107 (11)(f) shows that the category of 'ready-to-serve' food is excluded from the main entry and the category of 'food served for consumption' is excluded vide the explanation. The 'explanation' given after the schedule entry C-107(11)(f) which states that 'the items referred to in clause (a) to (f) (of schedule entry C-107 (11)) will not be covered by the scope of the entry when those are served for consumption *excludes all items listed from (a) to (f) from schedule entry C-107(11) if they are served in hotels, restaurants, eating houses, refreshment rooms, boarding establishments and other similar entities.* This explanation applies to all the clauses from (a) to (f) whereas the exclusion of 'ready-to serve' foods applies only to clause (f). Both the exclusions i.e exclusion to 'ready to serve food' from the main entry and the exclusion provided in the Explanation render themselves to construction and are to be attributed some meaning.

Thus,

- The exclusion of 'Ready to serve foods in the main entry' excludes ready-to-eat food served in any place.
- The exclusion of 'Food served for consumption' as given in the explanation excludes food served in hotels, restaurants, eating houses, refreshment rooms, boarding establishments and other similar entities.

With respect to the above, "Nutralite" would not be covered by any of the schedule entries as canvassed by the applicant. In absence of any specific entry it would be covered by the residual entry E-1 carrying rate of tax of 12.5%.

6. JUDGEMENTS QUOTED BY THE APPLICANT

The applicant has cited certain judgements in support of his contention. I now proceed to deal with these judgements.

- a. Amar Sales Agency vs The State of Gujarat (SA no 199 of 1979)
- b. Hiralal Datram vs The State of Gujarat (SA no 288 of 1979)
- c. Thakur Liladhar Vaghajibhai vs The State of Gujarat (SA no 260 and 261 of 1979).

- All these judgements are passed by the Sales Tax Tribunal of Gujarat and as such they are not binding in the State of Maharashtra. Secondly, they are passed in a different context. The entry under consideration in these judgements reads 'Hydrogenated vegetable Oils including vanaspati'. Thus this entry covers only 'Hydrogenated oils'. I have already dealt with the question of whether 'Nutralite' is a 'hydrogenated oil' and have come to the conclusion that as it is not prepared by hydrogenation, it is not hydrogenated oil.
- The DDQ in the case of Berar Oil Industries (DDQ-1175/13/B-7 dt 9.7.1975) held that 'Margarine' is a hydrogenated oil. This DDQ was also passed in a different context. The entry under consideration in this order read ' Hydrogenated vegetable Oils including vanaspati'. As 'Nutralite' is not a hydrogenated vegetable oil, the DDQ is not applicable to this case.

7. OTHER CONTENTIONS

- The applicant has referred to the Kerala and Tamil Nadu schedules where "margarine" is notified in the entry for ' Edible oils' and as a vegetable product respectively. Although, this classification is not germane to the present proceeding, I would like to distinguish the facts. Under the Kerala Act, Margarine is specifically mentioned in the entry for edible oils. The schedule entry reads as ,'' Oils, edible or inedible including refined or hydrogenated oils and margarine not elsewhere mentioned in this Schedule or in the Second Schedule.' Thus, Margarine is specifically mentioned in the entry and is not notified as an 'edible oil.' So also under the Tamil Nadu Act, Margarine finds a special mention under the category of 'vegetable oil products' and not under 'vegetable oils' which only adds credence to the observations made by me.
- The applicant has also referred to the excise heading 1517 under the Central Excise and Tariff Act. Excise heading 1517 is not all relevant as none of the entries under consideration are referential to the Excise headings. Secondly, under the Excise Act, Margarine is not categorized under the headings for edible oils which are from 1507 to 1516.

8. In the backdrop of the discussion held hereinabove, it is hereby ordered that, -

ORDER

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

No.DDQ-11/2006/Adm-2/40/B- 1

Mumbai, dt :-22.10.2007

The 'Table Margarine' supplied by the Applicant through invoice No.IJ0660176 dt.6.6.2006 under the mark 'Nutralite' gets covered by Entry 1 in Schedule 'E' appended to the Act and is therefore taxable @ 12.5%.

(SANJAY BHATIA)
Commissioner of Sales Tax,
Maharashtra State, Mumbai.