AFR

HIGH COURT OF CHHATTISGARH, BILASPUR

W.P.(C) No. 2139 of 2019

Order reserved on : 21/03/2024

Order delivered on : 01/04/2024

1. Small Scale Ice Cream Manufacturer Association (Reg.) Through Vice President, R/o Registered Address: 20/40 Old Market, West Patel Nagar, New Delhi- 110008
2. Vivek Mishra Vice President – All Inida Small Scale Ice Cream Manufacturer Association S/o Shri Jagdish Prasad Mishra, Aged about 41 years, R/o Near Shiv Mandir, Vidhya Nagar, Bilaspur, Chhattisgarh

---- Petitioners

Versus

1. Union of India, Through its Secretary, Ministry of Finance, Ministry of Finance Department of Expenditure Room No. 76, New Delhi – 110001
2. GST Council, Through its Secretary, 5th Floor, Tower II, Jeewan Bharti Building, Janpath Road, Cannaught Place, New Delhi- 110001

---- Respondents

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For Petitioners	:	Mr. A.V. Shridhar, Advocate
For Respondents	:	Mr. Ramakant Mishra, Deputy Solicitor General along with Mr. Tushar Dhar Diwan, Central Government Counsel

Hon'ble Shri Justice Rakesh Mohan Pandey

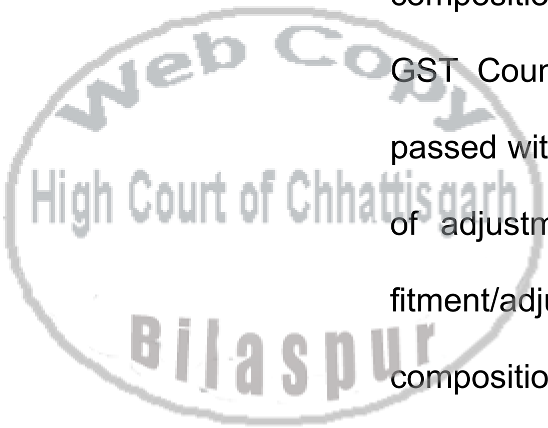
C.A.V. Order

1. The petitioners have filed this petition seeking the following relief(s):-

> "**10.A** That this Hon'ble Court may kindly be pleased to issue an appropriate writ/order/direction thereby directing the respondents to produce the entire records before the Hon'ble Court.
>
> **10.B** That this Hon'ble Court may kindly be pleased to quash the impugned recommendations of the GST Council being *void ab initio*.
>
> **10.C** That this Hon'ble Court may kindly be pleased to strike down the impugned notification no 8/2017-Central Tax dated 27.06.2017 (Annexure P/1) holding it to be ultravires.
>
> **10.D** Any other relief this Hon'ble Court deems fit and proper may be passed."

2. Petitioner No. 1 is Small Scale Ice Cream Manufacturer Association and Petitioner No. 2 is its Vice President. It is pleaded in the petition that the

petitioners were subjected to various taxes like VAT, Service Tax, Luxury Tax etc., however with the enforcement of the Goods and Service Tax Act (GST), various Central and State Taxes were unified. The main feature of the scheme is that the business or person who has opted to pay tax under this scheme can pay tax at a flat percentage of turnovers every quarter, instead of paying tax at a normal rate every month. The outer limit of Rs. 50 lacs of turnover has been extended to Rs. 75 lacs of turnover and was subsequently extended to Rs. 1.5 crores as provided under Section 10 of the GST Act. In order to control the revenue loss, the GST Council introduced a negative list of items on which benefits of the composition scheme shall not be extended. In the 17th meeting of the GST Council convened on 18th June 2017, certain resolutions were passed with regard to the approval of draft GST Rules and related Forms of adjustment of GST Rates on certain items etc. With regard to fitment/adjustment of GST Rates on certain items, particularly composition scheme on Ice Cream Manufacturers, it was observed as under:-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> "**8.4** Shri R.K. Tiwari, Additional Chief Secretary (ACS), Uttar Pradesh, stated that his State had a large number of SMEs falling within the annual turnover of Rs.1 crore and if all of them opted for Composition scheme, they would suffer a very large scale revenue loss to the tune of about Rs.50,000 crore. The Hon'ble Deputy Chief Minister of Gujarat stated that his State also had a very large number of SMEs. He proposed to increase the turnover limit for Composition scheme to Rs.75 lakh so that loss of revenue to the Government was comparatively less and suggested to keep the rate of tax at 2%. Dr. P.D. Vaghela, CCT, Gujarat, stated that originally, they had opposed the proposal to extend the benefit of Composition scheme to manufacturers as this could lead to evasion of tax. He stated that some industries should not be extended the benefit of Composition scheme as this could lead to windfall profit for them, particularly where the rate of tax on inputs was Nil. He gave the example of the Ice Cream Manufacturing Units which would procure milk at the Nil rate of tax

and pay minimal duty on their final product. He further observed that the rate of tax of 2% under the Composition scheme for manufacturers was too low. He also pointed out that only three States extended the benefit of Composition scheme to manufacturers."

3. The Council approved rates of GST on the supply of goods as under:-

(i) For the Composition scheme to increase the annual turnover threshold from Rs. 50 lakh to Rs. 75 lakh for eligible taxpayers and to have a list of manufacturers who shall be ineligible for the Composition scheme. However, no clear decision was taken regarding the applicability of this decision to the Special Category States;

(ii) To tax insulin formulations of all types at the rate of 5% instead of the proposed rates of 12%/5%;

(iii) To exempt tax on children's pictures, drawings or colouring books instead of the proposed tax rate of 12%

(iv) To tax bamboo furniture at the rate of 18% instead of the proposed rate of 28%;

(v) Approved the exemption from IGST on certain imports, namely, bilateral commitments between India and Pakistan/Bangladesh for regulation of bus services; technical exemption for temporary import/re-import; and to declare inter-state movement of any mode of conveyance for carrying goods or passengers or both or for repairs and maintenance as neither a supply of goods nor a supply of services.

4. In the meeting convened on 18th June 2017, the Council approved that Manufacturers of the following goods shall not be eligible for the Composition Levy:-

a) Ice Cream and other edible ice, whether or not containing cocoa;

b) Pan Masala;

c) Tobacco and manufactured tobacco substitutes.

5. Learned counsel appearing for the petitioners would submit that the decision of the GST Council with regard to the exclusion of Ice Cream Manufacturers from the purview of composite levy of tax is erroneous and

illegal. He would further submit that there is no reason assigned by the Council for the inclusion of Ice Cream Manufacturers in the negative list. He would also submit that the Council lost sight of the fact that all Ice Creams are milk-based and even Ice Candy is also termed 'Ice Cream'. He would contend that the Council in an unjust, illegal and arbitrary manner has treated the Ice Cream at par with Pan Masala and Tobacco products. He would further contend that initially a list of 09 items including Ice Cream was included in the negative list, but after discussion, the same were withdrawn from that list. He would also contend that only the State of Gujarat has suggested not extending the benefits of the composition of levy tax on Ice Cream whereas the State of Jammu and Kashmir and the Chief Economic Adviser have suggested keeping only Pan Masala and Tobacco in the negative list. He would argue that the Ice Cream Manufacturers are placed in the 18% bracket of GST which would lead to the shutting down of Small Scale Ice Cream Manufacturing Units. In support of his contention, he placed reliance on the judgments passed by the Hon'ble Supreme Court in the matter of ***Aashirwad Films*** **vs.** ***Union of India & Others*** reported in ***(2007) 6 SCC 624***; the matter of ***Ayurveda Pharmacy and another*** **vs.** ***State of T.N.*** reported in ***(1989) 2 SCC 2851*** and the matter of ***M/s. East India Tobacco Co., etc*** **vs.** ***State of A.P. and another*** reported in ***AIR 1962 SC 1733***.

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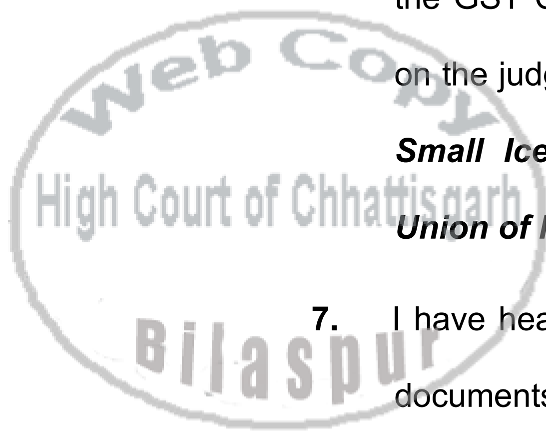
6. On the other hand, the learned Deputy Solicitor General appearing for the respondents would oppose. He would submit that the object of preparation of the negative list is to place the products of the negative list in a tax slab so as to dissuade the user from the use of products in the negative list which essentially contains products of physical and social hazards. He would further argue that the raw material required for the

production of the Ice Cream i.e. Milk has been placed in the nil slab of GST and is subject to minimal taxation and thus ousting of Ice Cream products from the purview of the composition scheme is not in consonance with the spirits of the schemes of taxation. He would also submit that the Small Scale Ice Cream Manufacturers contribute to 70-80% of the Ice Cream manufacturing in India and compared to the earlier scheme of taxation which was 1-2%, are now subjected to 18% Tax whereas Large Scale Ice Cream Manufacturers who were paying 24% Tax are now being subjected to 18% Tax. It is also argued that the decision has been taken after taking into consideration all the aspects of the GST Council. Learned Deputy Solicitor General has placed reliance on the judgment rendered by the High Court of Delhi in the matter of ***Del Small Ice Cream Manufacturers Welfare's Association (Reg.)* vs. *Union of India & Anr.*** passed in ***W.P.(C) 5252/2019***.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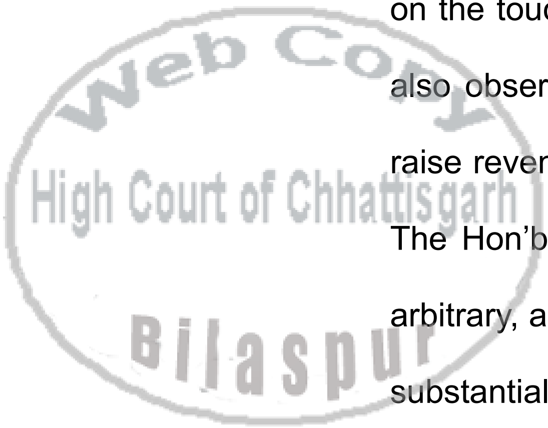
7. I have heard learned counsel appearing for the parties and perused the documents annexed to this petition with utmost circumspection.

8. The limited grievance of the petitioners is that the 'Ice Cream' has been placed on par with Pan Masala and Tobacco.

9. From a perusal of the resolution passed by the GST Council, it is evident that the goods and services have been divided into 05 Tax slabs for collection of the tax, that is (*i*) 0%, (*ii*) 5%, (*iii*) 12%, (*iv*) 18% and (*v*) 28%. It was discussed in the meeting that the Small Scale Ice Cream Industries have been put out of the composition scheme and the Manufacturers have been put under the category of 18% of the GST Scheme. It was also discussed that except for the big brands of Ice Cream Industries, 80-90% of Ice Cream Industries fall under the Small Scale Industries and are low in their turnover and transaction business. The Council after

discussion, put Pasta, Macaroni, Cakes, Malt, Mineral Water, Tobacco, Pan Masala etc. under the category of 18% GST and at the same time, kept the rate of tax for Human Hair (dressed, Thinned, and Bleached), Agarbatti at nil. The Council kept the rate of tax for certain items at 5% or 12%, though those were the Luxurious items.

10. The Hon'ble Supreme Court in the matter of ***Aashirwad Films* (supra)** while dealing with different rates of entertainment tax on the basis of language held that taxation laws must also pass the test of Article 14 of the Constitution of India and the classification must be reasonable. It is further observed that it is important to read the object of a taxation statute on the touchstone of social values as mentioned in the Constitution. It is also observed that the instrument of taxation is not merely a means to raise revenue in India and it ought to be, a means to reduce inequalities. The Hon'ble Supreme Court also held that a classification must not be arbitrary, artificial or evasive and there must be a reasonable, natural and substantial distinction in the nature of the class or classes upon which the law operates. The relevant paras- 14, 15 and 16 are as under:-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> "**14.** It has been accepted without dispute that taxation laws must also pass the test of Article 14 of the Constitution of India, It has been laid down in a large number of decision of this Court that a taxation statute for the reasons of functional expediency and even otherwise, can pick and choose to tax some. Importantly there is a rider operation on this wide power to tax and even discriminate in taxation: that the classification thus chosen must be reasonable. The extent of reasonability of any taxation statute lies in its efficiency to achieve the object sought to be achieved by the status. Thus, the classification must bear a nexus with the object sought to be achieved [See Moopil Nair v. State of Kerala, 2 AIR 1961 SC 552, East India Tobacco Co. v. State of Andhra Pradesh, 3 AIR 1962 SC 1733, V. Venugopala Ravi Varma Rajah v. Union of India and Anr., 4 AIR 1969 SC 1094, Assistant Director of Inspection Investigation v. Kum. A.B. Shanthi, 5 AIR 2002 SC 2188, The Associated Cement Companies Ltd. v. Government of Andhra Pradesh and Anr., 6 AIR 2006 SC 928].

15. Objective in a statute may have a wide range. But the entire matter should also be considered from a social angle. In any case, it cannot be the object of any statute to be socially divisive in which event it may fall foul of broad constitutional scheme enshrined under Articles 19, 21 as also the Preamble of the Constitution of India.

16. In that behalf, it is important to read the object of a taxation statute on the touchstone of social values as mentioned in the Constitution. An adverse conclusion can be drawn if a particular statute goes against such values. It is on thing to say that the taxation statute does not further social good, but quite another when it disturbs the social fabric. The court may take adverse note in respect to statutes falling in the latter category. We herein note two cases where an attempt has been made to raise this discussion to the pedestal of Directive Principles. In Sri Srinivasa Theatre and Ors. v. Government of Tamil Nadu and Ors., 7 [(1992) 2 SCC 643], this Court held :

> "Article 14 of the Constitution enjoins upon the State not to deny to any person 'Equality before law' or 'the equal protection of laws' within the territory of India, The two expressions do not mean the same thing even if there may be much in common-Equality before law is a dynamic concept having many facets. One facet – the most commonly acknowledged – is that there shall be no privileged person or class and that none shall be above law. A facet which is of immediate relevance herein is the obligation upon the State to bring about, through the machinery of law, a more equal society envisaged by the preamble and Part IV of our Constitution. For, equality before law can be predicated meaningfully only in an equal society i.e., in a society contemplated by Article 38 of the Constitution, which reads:
>
> > 38. State to secure a social order for the promotion of welfare of the people. (1) The State shall strive to promote the welfare of the people by securing and protecting as effectively as it may a social, economic and political, shall inform all the institutions of the national life. (2) The State shall, in particular, strive to minimise the inequalities in income, and endeavour to eliminate inequalities, in status, facilities and opportunities, not only amongst individuals but also amongst groups of people residing in different areas or engaged in different vocations. The instrument of taxation is not merely a means to raise revenue in India; it is, and ought to be, a means to reduce inequalities. You don't tax a poor man. You tax the rich and the richer one gets, proportionately greater burden he has to bear. Indeed, a few years ago, the Income-tax Act taxed 94p out of every rupee earned by an individual over and above Rupees one lakh. The

> Estate Duty Act, no doubt since repealed, Wealth-tax Act an Gift-tax Act are all measures in the same direction. It is for this reason that while applying the doctrine of classification – developed mainly with reference to an under the concept of “equal protection of laws” Parliament – is allowed more freedom of choice in the matter of taxation vis-a-vis other laws... In the matter of taxation it is, thus, not a question of power but one of constraints of policy – the interests of economy, of trade, profession and industry, the justness of the burden, its 'acceptability' and other similar considerations. We do not mean to say that taxation laws are immune from attack based upon Article 14. It is only that Parliament and legislatures are accorded a greater freedom and latitude in choosing the persons upon whom and the situations and stages at which it can levy tax. We are not unaware that this greater latitude has been recognised in USA and UK even without resorting to the concepts of 'equality before law' or “the equal protection of laws” - as something that is inherent in the very power of taxation and it has been accepted in this country as well. In the context of our Constitution, however, there is an added obligation upon the State to employ the power of taxation – nay, all its powers – to achieve the goal adumbrated in Article 38.”
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> (Emphasis supplied)

11. In the matter of ***Ayurveda Pharmacy*** **(supra)** while dealing with the levy of sales tax on Ayurvedic drugs and medicines, the Hon'ble Supreme Court held that the Legislature is authorized to select different rates of tax for different commodities, but for the same class or category, there must be a rational basis for discrimination. The relevant para – 6 is reproduced herein below:-

> “**6.** We think that the appeals are entitled to succeed. Item 95 mentions the rate of 7% (now 8%) as the tax to be levied at the point of first sale in the State. Item 135 provides a rate of 30% in respect of Arishtams and Asavas at the point of first sale. We see no reason why Arishtams and Asavas should be treated differently from the general class of Ayurvedic medicines covered by Item 95. It is open to the Legislature, or the State Government if it is authorised in that behalf by the Legislature, to select different rates of tax for different commodities. But where the commodities belong to the same class or category, there must be a rational basis for discriminating between one commodity and another

for the purpose of imposing tax. It is commonly known that considerations of economic policy constitute a basis for levying different rates of sales tax. For instance, the object may be to encourage a certain trade or industry in the context of the State policy for economic growth, and a lower rate would be considered justified in the case of such a commodity. There may be several such considerations bearing directly on the choice of the rate of sales tax, and so long as there is good reason for making the distinction from other commodities no complaint can be made. What the actual rate should be is not a matter for the courts to determine generally, but where a distinction is made between commodities falling in the same category a question arises at once before a Court whether there is justification for the discrimination. In the present case, we are not satisfied that the reason behind the rate of 30% on the turnover of Arishtams and Asavas constitutes good ground for taking those two preparations out from the general class of medicinal preparations to which a lower rate has been applied. In Adhyaksha Mathur Babus Sakti Oushadhalaya Dacca (P) Ltd. v. Union of India (1963) 3 SCR 957, this Court considered whether the Ayurvedic medicinal preparations known as Mritasanjibani, Mritasanjibani Sudha and Mritasanjibani Sura, prepared in accordance with an acknowledged Ayurvedic formula, could be brought to tax under the relevant State Excise Act when medicinal preparations were liable to excise duty under the Medicinal and Toilet Preparations (Excise Duty) Act, which was a Central Act. The Court held that the three preparations were medicinal preparations, and observed that the mere circumstance that they contained a high percentage of alcohol and could be used as ordinary alcoholic beverages could not justify their being treated differently from other medicinal preparations. The Court said (at p. 629 of AIR) :

> "So if these preparations are medicinal preparations but are also capable of being used as ordinary alcoholic beverages, they will fall under the (Central) Act and will be liable to duty under item No. of the Schedule at the rate of Rs.17.50 np per galion of the strength of London proof spirit. On a consideration of the material that has been placed before us, therefore, the only conclusion to which we can come is that these preparations are medicinal preparations according to the standard Ayurvedic text-books referred to already, though they are also capable of being used as ordinary alcoholic beverages. They cannot however be taxed under the various Excise Acts in force in the concerned States in view of their being medicinal preparations which are governed by the Act."

We are of opinion that similar considerations should apply to the appeals before us. The two preparations, Arishtams and Asavas, are medicinal preparations, and even though they contain a high

> alcohol content, so long as they continue to be identified as medicinal preparations they must be treated, for the purposes of the Sales Tax Law, in like manner as medicinal preparations generally, including those containing a lower percentage of alcohol. On this ground alone the appellants are entitled to succeed."

12. The judgment relied on by the learned counsel for the respondents rendered in the matter of ***Del Small Ice Cream Manufacturers Welfare's Association*** **(supra),** where the petition was filed impugning the decision dated 18th June, 2017 of the Goods and Services Tax Council wherein the High Court of Delhi held that besides pan masala and tobacco, aerated water has also been excluded from the benefit of Section 10(1) of the GST Act. The relevant paras- 19, 20 and 22 are reproduced herein below:-

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> "**19.** We have enquired from the counsel for the respondent no. 2 GST Council, whether any study has been done by the respondent no.2 GST Council, of the tax effect of extending benefit of Section 10(1) to small scale manufacturers of other similar goods and services and whether after considering all the said goods and services, any decision has been taken to exempt all those goods and services from the benefit of Section 10(1) of the Act, the tax effect whereof cannot be absorbed by the State.
>
> **20.** At least from the minutes of the two meetings placed before us, it does not appear so.
>
> **22.** We, in the circumstances, are of the view that the only direction which can be issued in this petition is, to direct the respondent no.2 GST Council to reconsider the exclusion of small scale manufactures of ice cream from the benefit of Section 10(1) of the Act, including on the aforesaid two parameters i.e. the components used in the ice cream and the GST payable thereon and other similar goods having similar tax effect continuing to enjoy the benefit. We direct accordingly."

13. From a perusal of the decision taken by the Council in the meeting, it appears that no reason has been assigned by the Council to exclude the

Ice Cream Manufacturers from the benefit of Section 10(1) of the GST Act. The Council ought to have taken into consideration the socio-political effect while putting the Ice Cream within the tax regime of 18%.

14. The taxation law should pass the test of Article 14 of the Constitution of India and there should be reasonable classification. Admittedly, Ice Cream is being widely consumed by the people of India. It cannot be termed a luxurious item as all kinds of people use to taste Ice Cream. The Council ought to have taken into consideration the socio-economic effect as mentioned in the Constitution.

15. Taking into consideration the above-stated facts and the law laid down by the Hon'ble Supreme Court and the High Court of Delhi, this petition is disposed of with a direction to respondent No. 2/GST Council to re-consider the exclusion of Small Scale Manufacturers of Ice Cream from the benefit of Section 10(1) of the GST Act in light of the judgments passed by the Hon'ble Supreme Court. It is expected that the Council shall take a decision preferably within a period of three months from the date of receipt of a copy of this order.

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16. With the aforesaid observation(s) / direction(s), this petition is disposed of.

Sd/-
(Rakesh Mohan Pandey)
Judge

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