



**IN THE HIGH COURT OF KARNATAKA AT**

**BENGALURU**

**DATED THIS THE 23<sup>RD</sup> DAY OF OCTOBER, 2017**

**BEFORE**

**THE HON'BLE Dr.JUSTICE VINEET KOTHARI**

**WRIT PETITION No.49577/2014 (T-RES)**

**BETWEEN**

M/s Bella Premier Happy Hygiene  
Care Private Limited,  
# 319/1, A Block, Ground Floor,  
Hosur Main Road,  
Bengaluru-560 068.

Represented by Managing Director &  
Daniel Norbert Babalski, Director.

...Petitioner

(By Mr. Shivadass G., Advocate)

**AND**

1. State of Karnataka,  
Through its Principal Secretary,  
Finance Department,  
Vidhana Soudha,  
Bengaluru-560 001.

2. Commissioner of Commercial Taxes  
in Karnataka,  
"Vanijya Therige Karyalaya",  
Gandhinagar,  
Bengaluru-560 009.

...Respondents

(By Mr. T.K. Vedamurthy, AGA)

**2/26**

This writ petition is filed under Articles 226 and 227 of the Constitution of India praying to hold that Sec.3(ii) & 3(iii) of the Karnataka Act No.54/13, amending Sub-Clause (7) & inserting Sub-Clause (8) to Section 60 of KVAT Act respectively as illegal and violative of Article 19(1)(g) R/w Article 301 & Article 14 of Constitution of India.

This petition coming on for 'Final Hearing' this day, the court made the following:

**ORDER**

The petitioner, a manufacturer of 'All-in-one Diapers, Under-pads and Sanitary Napkins' has approached this Court by way of present writ petition, aggrieved by the Clarification Order dated **11.09.2014** passed by the Respondent-Commissioner of Commercial Tax Department under Section 59(4) R/w Section 60(8) of Karnataka Value Added Tax Act, 2003 (hereinafter referred to as 'the Act' for brevity), purportedly clarifying the rate of tax and over-ruling the previous decision by the Advance Ruling Authority (for short 'the ARA') on

**3/26**

**30.03.2007** issued in favour of the petitioner holding these commodities as taxable at the concessional rate of 4.5% under Schedule III of the Act.

2. Learned Commissioner by the impugned Clarification Order dated **11.09.2014** reversing the decision of Advance Ruling Authority has held that the said items cannot fall under Entry 60 of the Schedule III of the Act, and therefore, these items would be taxable in the residuary entry at the rate of 14.5% of the Act. The petitioner therefore, filed this petition challenging the said order as well as the vires of Section 60(8) of the Act, which was brought on the statute book by the later amendment w.e.f. **01.08.2013** by Act No.54 of 2013.

3. Learned counsel for petitioner Mr. Shivadass G. has urged before the Court that the ARA (a Committee of three Additional Commissioners constituted by the Commissioner himself and delegated the power by the Commissioner under Section 60 of the

**4/26**

Act) had not only passed the order in favour of the petitioner under Section 60(2)(d) of the Act and which order is final, as per Section 60(7) of the Act but it was passed after examining the matter in detail and giving an opportunity of hearing to the Department also and it held that that these items were taxable as "*Medical and pharmaceutical preparations; Medicated ointments manufactured or imported under license granted under the Drugs and Cosmetics Act, 1940; light liquid paraffin of IP grade; **Wadding gauze, bandages and similar articles for medical, surgical, dental or veterinary purpose; Diagnostics or laboratory reagents including prepared diagnostic or laboratory reagents***" and rightly so, but the learned Commissioner in the impugned order at **Annexure-A** dated **11.09.2014** following such Clarifications issued by him in two other cases of **M/s. Xtra Care Products Private Limited and M/s. Dowell Surgical Private Limited, Bangalore**, held that the '**Adult Diapers of various sizes**' were taxable under

**5/26**

Residuary entry taxable from 12.5% to 14.5% for the periods commencing from 01.04.2005 till the date of passing of the order.

4. The Learned counsel for petitioner, Mr.Shivadass G., also submitted that the State Government later on has issued a Notification on **31.03.2016** specifying the concessional rate of 5.5% on such Adult Diapers. He contended that firstly, the order passed by the learned Commissioner under Section 60(8) of the Act, could not be given any retrospective effect and secondly, the said Clarification on merits also is not legally sustainable and in the case of the petitioner itself, the Advance Ruling Authority had rightly held such products to be taxable at the concessional rate of 4.5% under Schedule III of the Act.

5. He further submitted that the respondent-Department had an option of filing a Revision Petition against the order passed by the Advance Ruling

**6/26**

Authority before the Commissioner within a period of four years, under Section 64(2) of the Act and if the assessee was so aggrieved by the order passed by the Advance Ruling Authority under Section 60(2)(d) of the Act, the assessee could also file an appeal before the High Court under Section 66(1) of the Act. He urged that since the Advance Ruling was in favour of the assessee-dealer, there was no question of assessee-dealer filing an appeal against the said order in the present case, but however, the Department having failed to agitate against the said order, should be deemed to have acquiesced and accepted the said ruling in the case of the petitioner and therefore, there was no justification for the learned Commissioner to pass the impugned order reversing the said Advance Ruling and issuing the so called Clarification which is not correct in law. He has also urged that such power given under amended provisions of Section 60(8) of the Act are also

**7/26**

ultra-vires and therefore, the said section also deserves to be quashed and struck down.

6. On the other hand, learned counsel for Revenue, Mr. Vedamurthy, argued to support the impugned order on the basis of the reasons given in the impugned order itself namely,

*“that since these Diapers are not necessarily usable by the patients in the Hospital only, but can be used at home also; therefore, they cannot fall under Entry 60 of the Schedule III of the Act.”*

7. I have heard the learned counsels and perused relevant statutes.

8. The relevant Entry 60 of Schedule III of the Act is quoted below for ready reference:

**“Section 59: Instructions to Subordinate Authorities:**

*(1) The Government and the Commissioner may from time to time, issue such orders, instructions and directions to all officers*

**8/26**

*[including Commercial Tax Inspectors] and persons employed in the execution of this Act as they may deem fit for the administration of this Act, and all such officers and persons shall observe and follow such orders, instructions and directions of the Government and the Commissioner.*

*(2) No such order, instructions, or directions shall be issued under sub-section (1) so as to interfere with the discretion of any appellate authority in the exercise of its appellate functions.*

*(3) All officers and persons employed in the execution of this Act, shall observe and follow such administrative instructions as may be issued to them for their guidance by the Additional Commissioner or Joint Commissioner within whose jurisdiction they perform their functions.*

*(4) Without prejudice to the generality of the foregoing power, the Commissioner may, on his own motion or on an application by a registered dealer liable to pay tax under the Act, if he considers it necessary or expedient so to do, for the purpose of maintaining uniformity in*

**9/26**

*the work of assessments and collection of revenue, clarify the rate of tax payable under this Act in respect of goods liable to tax under the Act, and all officers and persons employed in the execution of this Act shall observe and follow such clarification.*

*(5) No such application under subsection(4) shall be entertained unless it is accompanied by proof of payment of such fee, paid in such manner, as may be prescribed.*

9. The relevant extraction of Advance Ruling Authority, order dated 30.03.2007 (Annexure-B) is quoted below for ready reference:

**ORDER NO.AR.CLRCR-119/2006,**  
**DATED:30.03.2007**

*The applicant M/s.Bellapremier Happy Hygienecare Private Limited, are registered dealer under KVAT Act, 2003 holding TIN No. 29820201030 born on the files of LVA-020, dealing in Adult Diapers and Under pads, which are used by patients under Medical treatments and has sought clarification on the rate of tax applicable to those goods.*

**10/26**

*In response to the notice, Sri.Arkadiusz Grochowski, General Manager, appeared and argued. It is represented that, Adult Diaper and Under pads for patients are used under medical conditions, where the patients are bedridden or has no control over urination etc., which has absorption characteristics and mainly used in hospitals. These items are also used in maternity treatments.*

*The applicant's understanding is that these products would fall in the category of Medical apparatus, covered by Entry No.60 of III Schedule to the KVAT Act, 2003 which reads as below:*

*“Medical and pharmaceutical preparation: Medicated ointments manufactured or imported under license granted under the Drugs and Cosmetics Act, 1940; light liquid paraffin of IP grade; Wadding gauze, bandages and similar articles for medical, surgical, dental or veterinary purposes; Diagnostics or laboratory reagents”.*

*The matter is examined. The literatures furnished are perused It is made clear that these products are **used on patients only during the time of medical treatments and therefore could be terms as wadding gauze, bandages***

**11/26**

***and similar articles for medicals, surgical treatments.***

*Therefore, it is hereby clarified that All-in-one diapers for adults and under pads use on patients in hospitals and in the course of medical treatment are covered under Entry No.60 of III Schedule to the KVAT Act, 2003 liable to tax at 4%.*

*(H.R.Teghoor)  
Member*

*(K.S.Rama Naik)  
Chairman*

10. The relevant extraction of the order passed by the Commissioner of Commercial Taxes, (Karnataka), Bangalore, (Annexure-A) is reproduced for ready reference:

8. *All contentions raised in the Statement of Objections are considered and findings are as below:*

***(i) A diaper is a kind of underwear that allows one to defecate or urinate in discreet manner. Disposable diapers contain absorbent chemicals and are thrown away after use. Under pads are***

**12/26**

*made with soft, non-woven top layers for wicking fluid away from the skin. **Cellulose fibers make them comfortable and absorbent, and a strong, leak proof back sheet holds fluid.** Both these products can be used in hospitals as well as in the home.*

***(ii)** Diapers are used by adults with incontinence or in certain circumstances where access **to a toilet is unavailable.** These can include those of advanced age, individuals with certain types of physical or mental disability and people working in extreme conditions. Diapers are primarily also worn by children who are not **yet potty trained** or experience bedwetting. Similarly, 'Sanitary Napkins' are absorbent pads worn by a woman while she is menstruating. All these products i.e., Adult Diapers, Baby Diapers, Underpads, Sanitary Napkins are similar in nature, though their size and specifications may vary.*

***(iii) Entry 60 of the III schedule reads as follows:***

13/26

**“Medical and pharmaceutical preparations;** Medicated ointments manufactured or imported under license granted under the Drugs and Cosmetics Act, 1940; Light liquid paraffin of IP grade; **Wadding gauze, Bandages and similar articles for medical, surgical, dental or veterinary purpose;** Surgical gloves and Syringes including needles; Diagnostic or laboratory reagents including prepared diagnostic or laboratory reagents.”

A careful reading of the above description makes it clear that diapers under pads and sanitary napkins cannot be termed as **“Wadding gauze” or “Bandage” or similar articles.** The classification of commodities under different schedules in the **KVAT Act is not based on the opinion or guidelines issued by the external agencies.** Specific goods are mentioned in the schedules and

**14/26**

*what are not specifically mentioned cannot be assumed to be included in the schedule. Entry 60 of the Third Schedule cannot be read to include medical device contended by the dealer. Further, the tax rate in other states is now relevant. **In some of the states the food grains are taxable, where as the Karnataka, the food grains are exempted from VAT.***

*Taxability of commodities is left to the will of the Legislature and the State in its wisdom has only considered the goods mentioned in Entry 60 of the III Schedule. The products for which the clarification has been issued by the ACAR are not sold under medical prescriptions issued by the doctors. It is a generic type of goods used by people of all ages. The dealer has not made out any case to show by people of all ages. The dealer has not made out any case to show that these*

**15/26**

*products are only used during the course of medical treatment.*

*(iv) The ACAR vide its order dated 30.03.2007 has come to the conclusion that these products are used on patients only during the time of medical treatment and therefore could be termed as wadding gauze, bandages and similar articles for medical, surgical treatments. The ACAR has concluded that “all in one diapers and Underpads” are used by the patients in hospitals and in the course of medical treatment. This observation of the ACAR is not correct for the reason that these products can be used in hospital as well as in the home. No similarity with reference to wadding gauze, bandages, etc., can be drawn from these products to say that they are falling under articles for medical purpose as mentioned in the Entry 60 of the III Schedule.*

***(v) Thus, ‘disposable diapers’ and ‘Underpads’ cannot be held as goods falling under entry 60 of III Schedule as held by the ACAR in its order dated 30.03.2017. In fact they are unscheduled***

**16/26**

*goods liable to tax at the rate of 14.5% with effect from 01.08.2012 under Section 4(1)(b)(iii) of the said Act.”*

9. *In the light of the above discussion, I am of the considered opinion that the goods-‘All in one diapers’, ‘Underpads’ and ‘Sanitary Napkins’ are not falling under Entry 60 of III Schedule to the KVAT Act, 2003 and are taxable at 14.5% under Section 4(1)(b)(iii) of the Karnataka Value Added Tax Act, 2003.*

10. *In view of the above findings, the following Clarification is issued:*

**CLARIFICATION NO.CLR.CR.26/2014-15**  
**DATED 11.09.2014**

*In suppression of the clarification No.AR.CLR.CR.119/2006-07 dated 30.03.2007 issued by the Authority for clarification and advance rulings and in exercise of the powers vested in me under sub-section (8) of Section 60 of KVAT Act, 2003, it is clarified that ‘All-in-one diapers’ of various sized ‘Underpads’ and ‘Sanitary Napkins’ are taxable at 14.5% under Section 4(1)(b)(iii) of the Karnataka Value Added Tax Act, 2003. This tax rate is*

**17/26**

*applicable to M/s.Bella Premier Happy Hygiene Care Private Limited, Bangalore from the date of publication of this clarification order in the official Gazette as per the provisions of Section 60(8). The rate of tax applicable in respect of all other dealers is as under for different periods:*

<u>Sl.No.</u>	<u>Period</u>	<u>Tax Rate</u>
1.	01.04.2005 to 31.03.2010	12.5%
2.	01.04.2010 to 31.03.2011	13.5%
3.	01.04.2011 to 31.07.2012	14%
4.	01.08.2012 and onwards	14.5%

(AJAY SETH)  
Commercial of Commercial Taxes,  
Karnataka, Bangalore.

11. The later Notification issued by the State Government on **31.03.2016** is also quoted below for ready reference:

**GOVERNMENT OF KARNATAKA**

No.FD 34 CSL 2016      Karnataka Government  
Secretariat,  
Vidhana Soudha,  
Bengaluru, dated 31.03.2016.

**18/26**

**NOTIFICATION-V**

*In exercise of the powers conferred by sub-section (3) of Section 4 of the Karnataka Value Added Tax Act, 2003, (Karnataka Act 32 of 2004), the Government of Karnataka hereby reduces with effect from the first day of April, 2016, the tax payable by a dealer under the said Act to five and one half percent on the sale of the following goods, namely:-*

- 1. Chatripudi prepared from, Groundnut, Nigar seeds, Copra, Bengalgram, Garlic, Flax Seeds and Friedgram.*
- 2. Office files made of Paper and Paper Boards.*
- 3. Adult Diapers.*
- 4. Hand operated rubber sheet making machine.*
- 5. Set Top Boxes for viewing Television content.*
- 6. Surgical gowns, masks, caps, coats and drapes of single use made of non-woven fabrics.*
- 7. Helmets.*
- 8. LED Bulbs.*

*By Order and in the name of the  
Governor of Karnataka,*

*(K.S.PADMAVATHI)  
Under Secretary to Government,  
Finance Department (C.T-1)*

**19/26**

To.

*The complier, Karnataka Gazette, Bengaluru, for publication in the Extraordinary Gazette dated 31.03.2016 and supply 100 copies to the Finance Department (CT-1) and 1000 copies to the Commissioner of Commercial Taxes, Gandhinagar, Bengaluru-560009.*

Copy to:

1. *The Accountant General(Accounts)/ (Audit), Karnataka, Bengaluru.*
2. *The Commissioner of Commercial Taxes, Gandhinagar, Bengaluru.*
3. *The Secretary, Karnataka Legislature Secretariat, Bengaluru. “*

12. Having given the earnest consideration to the relevant material, this Court is of the opinion that the petitioner cannot successfully challenge the constitutional validity and vires of Section 60(8) of the Act and this Court does not find any lack of legislative competence of the State Government in enacting and amending Section 60(8) of the Act, quoted above. The delegation by the Commissioner of his powers to issue clarifications and Advance Rulings by constituting an Authority for clarifications and Advance Rulings

**20/26**

comprising of atleast three Additional Commissioners, his subordinates is not illegal in any manner. However, such orders of Advance Ruling Authority can be undone or modified by overriding power vested in the Commissioner himself under Sub Section (8) inserted by Act No.54 of 2013 with effect from **01.08.2013**, and that cannot be said to be inconsistent, conflicting or *ultra vires* the provisions nor the said provisions can be said to be lacking the legislative competence on the part of the State Legislature. Therefore, as far as the validity of the Sub Section (8) challenged is concerned, that deserves to fail and that contention is accordingly rejected.

13. Coming to the next contention of the learned counsel for the petitioner that such a Clarification issued by Commissioner cannot be given retrospective effect. This Court finds substantial force in the said argument. A clarification issued by a *Quasi Judicial*

**21/26**

Authority in a delegated power in exercise of such power, cannot be made retrospective, unless specifically empowered by the parent legislation. Sub Section (8) of Section 59 does not give any such power to the learned Commissioner to issue any such Clarification or Ruling with a retrospective effect. In the absence of any such specific power, the respondent-Commissioner could not have issued the impugned clarification by the impugned order at Annexure-A dated **11.09.2014** to be effective from **01.04.2005** onwards. Therefore, the retrospectivity of the said order does not fit into the parameters of Sub Section (8) of Section 59 of the Act and to that extent, it deserves to be quashed.

14. The next contention of learned counsel for assessee is that the commodities in question namely 'All-in-one Diapers, Underpads and Sanitary Napkins' are definitely and rightly relate to Entry 60 quoted above, also has considerable force. The heading of the

**22/26**

said Entry 60 namely, 'Medical and Pharmaceutical preparations' enumerating several items also inter alia including therein, **“Wadding Gauze, Bandages and similar articles for medical, surgical etc., purposes”** has to be read '*ejusdem generis*' and the items manufactured and sold by the assessee are not the items which are alien to the said Entry 60. They may not be exactly “Wadding Gauze or Bandages” but they serve almost same or similar purposes. They are soft under pads made with non-woven top layers for wicking fluid and cellulose fibers make them comfortable and absorbent and a strong, leak proof back sheet holds the fluid and old people and senior citizens generally require them to avoid embarrassment of leaking fluids or urine passed out by them without even noticing, as their senses get weak in the old age. Such Underpads or Diapers definitely help them in maintaining good medical and hygienic conditions of their body and therefore, such items can certainly be said to be “similar

**23/26**

articles” read with “wadding gauze and bandages for medical and surgical purpose” etc.

15. It is well settled that if a commodity can by some rational understanding or analysis be brought or related to specific entry in the tax laws, the same cannot be taxed under the residuary entry and what is important is to apply the Trade Parlance Test or Common Parlance Test and not to apply the hair splitting exercise to apply the technical terms.

16. Going by the said well settled principles, this Court does not find any cogent reason in the impugned order passed by the Commission except the reason given by him of relying upon two previous orders passed by the Commissioner himself in two other cases, the facts of which are not discussed in detail in para No.2 of the order. This Court is therefore of the opinion that the impugned order passed on **11.09.2017** by the learned

**24/26**

Commissioner does not deserve to be upheld even on merits and the same is liable to be quashed.

17. Yet another reason not to allow the impugned order to hold the field is that the same was passed after seven years of the Department accepting the previous decision of the Advance Ruling Authority of the Department itself. The assessee had been collecting the concessional rate of VAT on the said items for all these years and had settled its affairs accordingly. There was no good reason to upset the said decision of the Advance Ruling Authority after so many years.

18. The impugned order of the Commissioner also does not seem to hold much water also in view of the fact that the State Government itself later on thought it fit to issue the substantive Notification for various products including the Adult Diapers to be taxable at the concessional rate of 5.5% only. The impugned order passed by the respondent-

**25/26**

Commissioner also appears to be in conflict with the legislative wisdom displayed by the State Government in the later Notification dated 31.03.2016, which also appears to have been issued to do away with the possibilities of disputes in this regard and to tax these commodities at concessional rate only in the larger public interest. The impugned Clarification issued by the respondent-Commissioner would have not only upset and disturbed the previous assessment orders passed in the case of petitioner-assessee but in many other cases also, because the Clarification issued by the Commissioner under Section 60 of the Act binds the Assessing Authorities in all such similar cases.

19. Thus, this Court does not find any substance in the argument raised by the learned counsel for Revenue and the reasons assigned in the impugned order and this Court is of the considered opinion that the present writ petition deserves to be allowed and the

**26/26**

impugned order passed by the respondent-  
Commissioner at Annexure-A dated 11.09.2014  
deserves to be quashed.

20. The petition is accordingly allowed and the  
impugned order passed by learned Commissioner at  
Annexure-A dated **11.09.2014** is quashed. No order as  
to costs.

**Sd/-  
JUDGE**

JS/BMC  
Sl.No.42