

Read:- Application dated 6<sup>th</sup> June,2005 of M/s. Inox Air Products Ltd., holder of Certificate of

Registration No. 411014/S/471.

Heard:- Shri. P. V. Surte, Advocate and Shri A. K. Majumdar, Dy.G.M. of the Company.

### **PROCEEDINGS**

(Under section 56(1)(a) and (2) of the Maharashtra Value Added Tax Act,2002.)

No.DDQ-11-05/Adm-5/19/B-1  
21-07-2005

Mumbai,dt.

The applicant is a registered dealer under the Maharashtra Value Added Tax Act, 2002 and is a manufacturer of industrial gases such as Oxygen, Hydrogen, Acetylene, Argon, Nitrogen etc. The applicant is a manufacturer of Medical Oxygen under the licence granted under the Drugs & Cosmetic Act, 1940. In this application, the applicant sought to know the rate of tax on 'Medical Oxygen' and enclosed by way of evidence the bill No. 021169 dated 16<sup>th</sup> May, 2005. The applicant had charged sales tax @ 4% on the sales of the product.

### **Contention :**

It is the contention of the applicant that the product qualifies for 'a medicinal formulation or preparation ready for use internally or on the body of human beings, for diagnosis, treatment, mitigation or prevention of any diseases' since the Medical Oxygen is used as drug in peripheral circulatory collapse, in acute respiratory failure, and in acute pulmonary oedema therefore, it can be called 'drug' as understood under schedule entry C-29.

### **Evidences :**

The applicant has enclosed five certificates issued by the following hospitals for treatment of various diseases so also, for prevention and mitigation of diseases.

- a) Nirmaya Hospital.
- b) Rakshak Hospital.

- c) Maharashtra Medical Foundation, Joshi Hospital.
- d) Hardikar Hospital.
- e) Pune Institute of Neurology.

The following documents are enclosed alongwith the application.

- (1) The certificate of renewal license to manufacture for sale of drugs other than those specified in schedule X.
- (2) Copy of sale bill.
- (3) Copies of certificates given by the hospitals.

The applicant also gave an additional submissions dated 28-5-2005 and the information given by the applicant could be summarized as follows.

- Ø The product is Medical Oxygen which is a drug covered by schedule entry C-29.
- Ø Reliance has been placed on the recent judgment of Kerala High Court in the case of M/s. Southern Gas Ltd Vs. State of Kerala (139 STC 504) in which case the High Court held that Medical Oxygen is used for administering the patients.
- Ø The Allahabad High Court Judgment in the case of M/s. Industrial Gases Vs. C.S.T. (21 STC 124) in which it was held that Medical Oxygen is sold for medicinal purposes.
- Ø It is a well recognised principle of interpretation that if there is a general entry and other a specific entry then the general entry must give way to specific entry.

In such cases it should be held that considered item falls within specific entry. (Reliance on the State of Gujarat Vs. Pfizer Ltd (82 STC 374) and State of Tamilnadu Vs. Blue Star Engineering (39 STC 194).

- Ø The term 'medicine' is not defined under the Act. However, in the Webster's Dictionary 'medicine' has been defined to mean substance or preparation used in treating diseases. The science and arts dealing with the maintenance of health and the prevention, elevation or cure of diseases.
- Ø The applicant has drawn attention to the fact that life saving drugs would be tax free by virtue of entry A-29. Oxygen Gas IP was classified under heading upto 31.12.1999. The then Commissioner of Sales Tax, vide circular No. 1T of dated 5-1-2000 has clarified that life saving drugs covered under entry A-29 is now covered by schedule entry C-II-32. In view of the above, it is amply clear that the department has already accepted that 'Medical Oxygen' comes in the category of life saving drugs after deletion of entry for life saving drugs. It could be covered in the category of drugs and medicines. The applicant has also made a plea that in case it is held that 'Medical Oxygen' is not covered under schedule entry C-29 and order under section 56(2) may be passed giving prospective effect from the date of order.

02. The case was fixed for hearing on 21<sup>st</sup> June, 2005. Shri. P. V. Surte, Advocate attended alongwith Shri. A. K. Majumdar, Dy.General .Manager. He submitted that the product under consideration is 'Medical Oxygen IP' which according to them is a drug covered by entry C-29 since, it is used for treatment as well as for mitigation of not only diseases but also disorder. It is also manufactured under the licence under Drugs & Cosmetics Act, 1940. Referring to the determination order in case of M/s. Sunny Industrial Gases in which it was held that 'Medical Oxygen IP' is not a drug. Shri. P. V. Surte, Advocate contended that one of the reasons the product was not held a drug was the fact that the applicant himself had collected taxes @ 13%. However, in this case, the applicant had not collected taxes @ 13% but @ 4%. Similarly, unlike the case of M/s Sunny Industrial, they have also produced evidence in the form of certificates certifying that the product is used for the treatment and mitigation of diseases and disorder. The contentions were made with regard to the High Court Judgment in the case of M/s. Southern Gas Ltd ( 139 STC 504).

03. The basic question for decision here relate to classification of 'Medical Oxygen IP'. The applicant's contention revolves around the point that as the impugned product is

manufactured under the Drugs Licence given by the Food & Administration under the Drugs & Cosmetics Act, 1940, and as it is used by the hospitals and dispensaries for treatment of patients affected by respiratory diseases the product qualifies as a drug under schedule entry C-29. Similar question was already decided in the case of M/s. Sunny Industrial Gases, in which the product was held as covered by residual entry and was not held a drug covered by the then entry C-II-37. The schedule entry under consideration in the case of M/s. Sunny Industrial Gases pertains to the classification under the Bombay Sales Tax Act, 1959 and on the other hand, the classification in the present case pertains to the schedule under the Maharashtra Value Added Tax Act, 2002. With respect to this reason, it is felt reasonable that the application of the applicant could be re-considered and re-examined in the light of new classification and therefore it escaped from the reach of section 56(3) of the Maharashtra Value Added Tax Act.

04. In understanding the product one has to look to the characteristics and nature of the product. The Characteristics of the product could be illustrated as under.

- Ø It is an inorganic element.
- Ø It is found in nature.
- Ø It is gaseous in form.

The gas is also used for industrial purposes as well as in hospitals for operation and emergencies. The question before me is whether the fact that Oxygen is used in hospital and dispensaries would be adequate to vest with the quality of a drug? The answer is provided by the wording of the entry C-29 itself. What should be characteristics of a drug are sufficiently laid down in schedule entry C-29 and the entry can be broken up into the following constituents:-

A product in order to be a drug should fulfill the following conditional ties.

- (1) It should be a formulation or preparation ready for use internally or externally on the human body.

- (2) It should be used for diagnosis, treatment, mitigation or prevention of any diseases or disorder.
- (3) It should be manufactured, imported, or stocked under a licence under the Drugs & Cosmetics Act, 1940.

It is contended by the applicant that 'Medical Oxygen' is not a formulation but a preparation. I agree with this proposition. It is a preparation which is also ready for use internally as it is inhaled by the patients. The product satisfies the third condition as it carries licence under the Drugs & Cosmetics Act. The crucial aspect is whether it could be said with a degree of confidence that the **Medicine Oxygen IP is used for either diagnosis or treatment or mitigation or prevention of any disease or disorder? Whether it fulfills the second condition is a crux of the matter, i.e., whether oxygen diagnoses or treats or mitigates or prevents disease or disorder?** I would have to examine the question from this angle.

05. For obvious reasons, medical oxygen is incapable of diagnosing any disease. Normally, when a person falls short of breath or does not get adequate supply of Oxygen then such a person is artificially administered Medical Oxygen IP. The person may not be able to inhale Oxygen naturally or supply of Oxygen falls short for him due to respiratory problems like asthma. The patients suffering from asthma is not able to inhale oxygen naturally like any other normal person and such a person during time of emergencies is administered with Medical Oxygen IP. Thus, acute respiratory problems are circumstances during which medical oxygen is used in a large scale. Is such a use, sufficient to qualify it as a drug? The answer cannot be in the affirmative. It cannot be said that Oxygen is used for treatment of the disease or disorder. Oxygen is an important element on which the human species live and would die without it. It is like water, a life sustaining element of nature. When any human being fails to draw oxygen from the air on his own or unable to inhale it properly or adequately or does not get sufficient water, such a person would definitely die. This does not mean that oxygen or as the case may be water, are medicines or drugs. These are items of general utility and life sustaining but that does not imply that they can be termed as 'medicine' or 'drugs'. The fact that oxygen is IP grade does not make it a pharmaceutical preparation. The IP grade only denotes the purity of oxygen and its fitness for human consumption. It is also like potable water as impure water. Potable water fit for human consumption is never perceived or understood by a common man as medicine. When oxygen is naturally inhaled from the air or the atmosphere it need not be of IP grade

because the intake is normal and natural with filters provided in the body. But Medical Oxygen is artificially prepared and artificially administered and which renders it necessary to be of certain degree of purity making it fit for human consumption. IP grade, therefore, does not make it a drug. It simply declares the fitness of the product for human consumption. Even the mountaineers climbing mountains at great height have to carry small oxygen cylinders because of the scarcity of oxygen at heights. The mountaineers carry oxygen not because of its life sustaining capacity but the essential elements of necessity which cannot make oxygen a drug. The same is true of deep sea divers carrying oxygen. Human beings need oxygen in order to break down food for energy. The primary function of the respiratory system is to supply the blood with oxygen in order for the blood to deliver it to all parts of the body. Thus, the function of oxygen is a natural function and it does not have any curative properties. A drug needs to have therapeutic characteristics and oxygen does not have therapeutic quality or attributes. Medical oxygen does not treat respiratory diseases. In respiratory problems because the patient is unable to inhale oxygen naturally medical Oxygen needs to be given artificially. ***But the oxygen does not in anyway treat the respiratory problems.*** Is oxygen used in the treatment of asthma? We do not need a qualified medical practitioner to confirm that oxygen does not treat any respiratory diseases. This brings us to the next question as to **whether oxygen mitigates respiratory problems?**

The answer is again negative It is true that in respiratory emergencies, the supply of oxygen at the right time provides relief and comfort to the patients in question. I would go further and say that when oxygen is not supplied at the critical juncture then the patients may collapse or die for want of oxygen. This is because, as said earlier, a human being simply cannot live without oxygen. It is fundamental to human life and when a patient is not able to inhale oxygen directly from the air the need arises to supply him with artificial oxygen. Just because the patient is administered oxygen due to his inability to take it naturally from air would not make oxygen a drug. A pain killer can it be called as a mitigating drug since it mitigates the pain caused by a disease or disorder. The Medical Oxygen does not mitigate the disease or treats the diseases. It only provides a relief when the affected person is not able to get it from the atmosphere. Therefore, I do not agree with the submission of Shri P.V.Surte, Advocate that Oxygen is used for mitigation, prevention or treatment of any diseases or disorder.

06. The next question pertains to the classification of commodity, a reference to the "Bible" of classification of commodity – the Harmonised Commodity Description & Coding

System would not be redundant – in fact it would provide a clue to the problem before us. The HSN as it is popularly called classifies Medical Oxygen as an inorganic chemical in the category of gases under entry 2804. The HSN has an independent Chapter devoted to the pharmaceuticals and pharmaceutical preparations in the form of Chapter 30. But oxygen is not classified as a pharmaceutical preparation in Chapter 30. The conclusion that can be drawn need not be expressed in words - it is crystal clear from the classification itself.

I also feel the need of falling back on the determination order in the case of M/s.Sunny Industrial Gases passed by my predecessor, in which it is comprehensively held that Oxygen is not a drug. The applicant had contended that the determination order in case of M/s. Sunny Industrial Gases, does not apply to his case because of the evidences produced by him which in his eyes, fortifies his case. I have gone through the certificates produced by the applicant. It is stated that Oxygen is used for prevention of respiratory problems and mitigation of diseases like myocardial infarction and in the casualty and intensive care unit for treatment of trauma patients and asthma patients. A certificate given by the Institute of Urology says that it is used for ventilatory support in neurological illness causing respiratory efforts and needing external oxygen supplements. This only confirms what I have said earlier that Medical Oxygen only supplements supply of natural oxygen It has not been recognized as a drug or medicine. The Certificates have not made any categorical assertion that the causes of diseases are treated by medical oxygen and therefore these certificates cannot be accepted on the face of it as an evidence with respect to the resolution of the issue on hand. These are certificates of interest to the applicant.

07. The applicant has placed reliance on the following judgements.

- a. Industrial Gases Vs. CST (21 STC 124)
- b. Indian Oxygen Ltd. Vs. State of Karnataka (79 STC 351)
- c. State of Karnataka Vs. Indian Oxygen Ltd. (129 STC 471)
- d. Southern Gas Ltd. Vs. State of Karnataka (137 STC 68)

In all the above cases, it has been held that Medicinal Oxygen is a drug. I do not wish to deal with each of the cases separately as the issue before us is clear in itself. The classification of a product under the schedule entry for drugs can be done only with reference to the specific wordings of entry C-29 and the conditional ties 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, medicinal oxygen cannot be considered to be a drug as it does not satisfy the essential condition of treatment and mitigation of disease and therefore, it cannot be held as a drug. Speaking about precedents, in the case of Southern Gas Ltd Vs. State of Karnataka (137 STC 68), it has been held by the esteemed court that 'nitrous oxide' and 'medicinal oxygen' are not drugs but are 'surgical aids'. Although there was an independent entry for drugs and medicines under the Karnataka Sales Tax Act, the product has not been held as a medicine.

The entries on which these judgments are based were different from the entry under the Bombay Sales Tax Act, or VAT Act and as such, the ratio of these judgments do not apply to the facts of the case before me.

08. The applicant has prayed for prospective effect to the order under section 56(2) in case the case is not held in their favour. In these circumstances, the plea of the applicant could not be entertained as there is no statutory misguidance in the matter. The entry relating to drug viz. C-II-37 under the Bombay Sales Tax Act, and C-29 under the VAT Act are parimateria same. There is already a determination in the case of M/s.Sunny Industrial Gases, holding the medical oxygen not as a drug. The determination in the case of M/s.Sunny Industrial Gases had comprehensively and categorically held that medical oxygen is not a medicine. Therefore, there was a statutory precedent which should have been made use of for the guidance of the applicant. The applicant, therefore, cannot be successful in his request for prospective effect since no reasoning of statutory misguidance having been established.

09. In the context of the deliberations detailed hereinabove, it is hereby ordered that,-

#### ORDER

(Under section 56(1) & (2) of the Maharashtra Value Added Tax Act,2002)

It is hereby declared that sales of Medical Oxygen effected through bill No. 021169 dated 16<sup>th</sup> May, 2005 would be exigible to a rate of tax @ 12.5% in accordance with schedule entry E-1.



**( B. C. KHATUA )**

**Commissioner of**

**Sales Tax,**

**Maharashtra State, Mumbai.**