REPORTABLE

IN THE SUPREME COURT OF INDIA
CIVIL APPELLATE JURISDICTION

CIVIL APPEAL NOS. 6468-6469 OF 2017
(ARISING OUT OF SLP(C) NOS. 14697-14698 OF 2016)

M/S. PARLE AGRO (P) LTD. …
APPELLANT

VERSUS

COMMISSIONER OF COMMERCIAL
TAXES, TRIVANDRUM
… RESPONDNET

WITH

CIVIL APPEAL NOS. 6471-6472 OF 2017
(ARISING OUT OF SLP(C) NOS. 24460-61 OF 2016)

M/S. WE SIX TRADERS ETC.ETC.
… APPELLANTS

VERSUS

COMMERCIAL TAX OFFICER & ANR..
… RESPONDNETS

WITH

CIVIL APPEAL NO.6470 OF 2017

(ARISING OUT OF SLP(C) NO. 9467 OF 2016)

ASSISTANT COMMISSIONER
(ASSESSMENT) & ANR
. … APPELLANTS

VERSUS

M/S. PARLE AGRO (P) LTD.
… RESPONDENT

J U D G M E N T

JUDGMENT

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ASHOK BHUSHAN, J.

Leave granted.

2. The issues raised in these appeals being interrelated have been heard together and the appeals are being disposed of by this common judgment.

3.Civil Appeals arising out of SLP(C) Nos. 1469798 of 2016 are being treated as leading case, the facts of which case shall be noted in detail for deciding these cases.

4.Civil Appeals arising out of SLP(C) Nos. 1469798 of 2016 and SLP(C) No.9467 of 2016 are between the same parties whereas Civil Appeals arising out of SLP(C) Nos.2446061 of 2016 have been filed by different appellants.

Civil Appeals arising out of SLP(C) Nos. 1469798 of 2016

5.The appellantM/s. Parle Agro (P) Ltd.is a dealer engaged in fruit juice based drink known as 'Appy Fizz' which has obtained certificate of registration under Kerala Value Added Tax Act, 2003 (hereinafter referred to as "Act, 2003"). The appellant was classifying the product as fruit juice based drink under Entry 71 of the notification issued under Section 6(1)(d) of Act, 2003 till 2007 and was paying @ 12.5% VAT. One M/s.Trade Lines (a distributor of appellant Company) was assessed by the authorities under the Act, 2003 holding that M/s. Trade Lines is liable to pay tax @ 20% on the product. M/s.Trade Lines filed OT Revision No.114/2013 in the High Court of Kerala against the order passed by Kerala Value Added Appellate Tribunal dismissing the appeal. The High Court vide its judgment and order dated 17th November, 2014 dismissed the revision upholding the order passed by the Assessment Officer and the First Appellate Authority. Special Leave Petition was filed by M/s. Trade Lines against the judgment of Kerala High Court which was, however, permitted to be withdrawn by order dated 19th January, 2015 of this Court. On 4th August, 2015 the assessment notices were issued to the appellant for Assessment Year 200915 proposing classification of 'Appy Fizz' under Section 6(1)(a)of the Act, 2003 as "aerated branded soft drink" and tax liability @ 20% . After receipt of the notices appellant filed an application dated 24th August, 2014 under Section 94 of the Act, 2003 seeking clarification of product 'Appy Fizz'. In the clarification application the appellant claimed that product 'Appy Fizz' had rightly been clarified as 'fruit juice based drink' and which has tax liability of 12.5%. Along with the clarification application appellant has filed certificates and expert opinions. Writ Petition No.26279/2015 was filed by the appellant before Kerala High Court seeking direction to the Commissioner of

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Commercial Taxes to consider and pass order on the application for clarification within a specified time and the proceedings initiated by the Commissioner of Commercial Taxes by different notices be kept in abeyance. Learned Single Judge by its judgment and order dated 31st August, 2015 disposed of the writ petition directing the Commissioner of Commercial Taxes to consider and pass orders on the clarification application within a period of one month from the date of receipt of the judgment and liberty was given to the appellant to produce all material on which it intends to place reliance to substantiate its clarification with regard to the classification of the product, further proceedings in various notices were kept in abeyance. The Assistant Commissioner and Commissioner of Commercial Taxes filed a writ appeal against the judgment of the learned Single Judge before Division Bench of the Kerala High Court. The Division Bench of Kerala High Court vide its judgment dated 5th October, 2015 dismissed the writ appeal by affirming the decision of the learned Single Judge.

6.After the above judgment of the Division Bench dated 5th October, 2015, the Committee of Joint Commissioner passed the clarification order dated 6th November, 2015 classifying the product as 'aerated branded soft drinks', at the rate of 20%. Against the order passed under Section 94 of Act, 2003, the appellant filed O.T. Appeal No.7 of 2015 in the Kerala High Court. The Division Bench by its judgment and order dated 5th February, 2016 dismissed the appeal filed by the appellant upholding the order dated 6th November, 2015. A review application was also filed by the appellant to review the judgment dated 5th February, 2016 which has been dismissed on 23rd March, 2016.

7.Civil Appeals arising out of SLP(C)No.1469798 of 2016 have been filed against the aforesaid order dated 5th February, 2016 and the review order dated 23rd March, 2016 by the appellant.

Civil Appeal arising out of SLP(C)No.9467 of 2016

8.The Assistant Commissioner (Assessment) and the Commissioner of Commercial Taxes have filed this appeal challenging the judgment dated 5th October, 2015 by which writ appeal filed by the Assistant Commissioner(Assessment) and another against the direction of the learned Single Judge dated 31st August, 2015 has been dismissed.

Civil Appeals arising out of SLP(C)Nos.2446061 of 2016

9.M/s.We Six Traders Etc.Etc.is a dealer in fruit juices and other drinks manufactured by M/s. Parle Agro (P) Ltd.Assessment Commissioner has issued notices for assessment years 201011

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to 201314 and April to June 2015 proposing to classify the product ‘Appy Fizz’ as ‘aerated branded soft drink’ @ 20% VAT.After the judgment of the High Court dated 5th February, 2016 in the case of M/s.Parle Agro (P) Ltd.order of assessment was issued against which the assessee filed appeal before Kerala Value Added Tribunal in which appeal the Tribunal directed the assessee to deposit 30% as precondition to hear the matter on merits. The assessee filed writ petition in the High Court challenging the aforesaid order passed by the Tribunal on the stay petition. The assessee submitted before the High Court that against the judgment of the High court dated 5th February, 2016 in the case of M/s. Parle Agro (P) Ltd. SLP has already been filed, hence, the assessee should not have been called to remit the entire amount. The High Court vide its judgment and order dated 14th July, 2016 disposed of the writ petition directing the demand made in the above cases shall remain stayed till disposal of the appeals on condition of assessee depositing 50% of the amount involved. Civil Appeals arising out of SLP(C)Nos. 2446061 of 2016 have been filed against the aforesaid judgment and order of the Kerala High Court dated 14th July, 2016.

10. We have heard Shri K.K.Venugopal, learned senior counsel for the assessee.Shri Jaideep Gupta, learned senior counsel has appeared for the Revenue.

11. Shri K.K.Venugopal, learned senior counsel, submits that both High Court and Committee of Commissioners erred in not classifying the product of 'Appy Fizz'under Entry 71 of S.R.O.No.119 of 2008. Classification of the product as 'aerated branded soft drinks, excluding soda'under Section 6(1)(a) is not the correct classification. It is submitted that the Revenue itself till 2007 has classified the product under Entry 71 with tax liability of 12.5%. He submits that judgment of Division Bench of Kerala High Court in M/s.Trade Lines cannot be binding precedent since the said judgment was rendered in the revision proceedings in which appellant was not a party and the revision proceedings were confined to the assessment order on the basis of facts on the record of that case. Prior to 2007 the product was covered under Entry 71. When in 2008 Entry 71 was amended, there was no amendment to the schedule under Section 6(1)(a). He submits that had the intention of the legislation was to pick up the certain products earlier covered under Entry 71 and place them in Schedule under Section 6, then entry 'aerated branded soft drinks, excluding soda'which earlier did not cover the said product, would also have been amended at the same time. He submits that if prior to 2007, 'Appy Fizz'could not be considered as an 'aerated branded soft drink'then there is no identifiable logic that the product would be so covered after 2007. Especially, there was no indication that the said product had been removed/ejected from Entry 71 after the amendment in 2007.

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12. Further, he submits that common parlance test which has been applied by the High Court is not the correct test to determine the classification to include the product, as entries under the VAT Act are technical or scientific in nature. Soft drinks under Kerala VAT would be those drinks that are synthetic whether or not aerated. The product in question is not a synthetic product. It contains more than 10% fruit juice. It is fruit juice based drink and not covered by Section 6(1)(a). A fruit juice based drink is more akin to fruit juice than soft drink. Subclause (5) of Entry 71 covers similar other products not specifically mentioned under any other entry in this list or any other schedule. The product is fully covered under alone entry. He further submits that Food Safety Authorities have recognized the product as a 'fruit drink'.

13. Shri Venugopal has placed reliance on the order dated 18.03.2008 of the Customs, Excise and Service Tax Appellate Tribunal where classification of the product was upheld as 'fruit based drink'and the Revenue's appeal was dismissed by this Court on 18th July, 2009. Shri Vanugopal further submits that neither the Committee of Commissioners nor the High Court has adverted to the technical evidence and certificate filed by the appellant along with proceedings under Section 94 of Act, 2003. The scientific evidence fully proved that products do not undergo aeration or carbonation; the product is thermally processed with CO2 which help in preserving the Apple Juice concentrate which is otherwise perishable in nature. The certifications fully proved the product as 'Thermally processed fruit juice based drink'.

14. Learned counsel further submitted that products which are covered under Section 6(1)(a) are all those products which are dangerous to health. They have deliberately been included on higher tax slab of 20% and lower tax slab on the products under Entry 71 was with object to promote the products under Entry 71.

15. Shri Jaideep Gupta, learned senior counsel, appearing for the State of Kerala refuting the submissions of Shri K.K.Venugopal contends that High Court has rightly held that product is an 'aerated branded soft drink'within the meaning of Section 6(1)(a). He submits that after deletion of Entry 71(4) by S.R.O.No.119 of 2008 which provided “Fruit pulp or fruit based drink”, it was clear indication of the legislation that the 'fruit based drinks'are out of Entry 71 and have to be covered into 'aerated branded soft drinks'under Section 6(1)(a).He submits that it is not disputed that 'Appy Fizz'is a branded drink and further it is aerated by CO2, hence, it is aerated drink.He submits that amendment of Entry 71 by S.R.O.No.119 of 2008 made the legislative intent clear and the High Court has rightly relying on the said amendment has held that product is not covered under Entry 71 and is liable to tax @ 20% under Section 6(1)(a).

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Learned counsel for the respondent, further, submits that CESTAT ruling has no relevance with regard to the classification under Act, 2003, since, the CESTAT ruling considered the different headings under Central Excise Tariff Act, 1975 which is not relevant. Learned counsel submitted that under the Rules of interpretation as contained in the Act, 2003, the product being not covered with any of HSN number common parlance or commercial parlance test has rightly been applied by the High Court. Under the common parlance even if the product contained more than 10% fruit concentrate it is a soft drink as commonly known and tax liability @ 20% has rightly been imposed.

16. Learned counsel for the parties have placed reliance on various cases which shall be referred to while considering the submissions in detail.

17. We have considered the submissions made by the learned counsel for the parties and perused the records.

18. From the submissions of learned counsel for the parties and the pleadings of the parties following are the main issues which arise for consideration in these appeals:

(1) What is interrelation between Section 6(1) (a) and Section 6(1) (d) of Act, 2003?

(2) What is scope and ambit of Item 5 of Entry 71 as amended ?

(3) Whether common parlance test is the only test to be applied for understanding the different entries under Section 6(1)(a) and Section 6(1)(d)?

(4) Principle of Noscitur a Sociis.

(5) Whether the Division Bench of Kerala High Court in M/s. Trade Lines can preclude the Committee of Joint Commissioners to examine the materials filed by the appellant along with Clarification Application under Section 94.

(6) Whether CESTAT decision dated 18.03 .2008 has any relevance with regard to the classification of product in question ?

(7) Whether decision and opinion of Food Safety Authorities on the product in question were relevant ?

(8) Whether the Committee of Joint Commissioners as well as the High Court has rightly discarded technical and expert opinion relied by the appellant ?

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(9) Conclusions.

19. Before we proceed to consider the submissions of the learned counsel for the parties, it is necessary to look into the statutory scheme and the relevant entries prior to amendment by S.R.O.No.119 of 2008.Section 6 of the Kerala Value Added Act, 2003 provides for levy of tax on sale or purchase of goods.Section 6(1)(a) which is relevant for the present case as existed before 1st April, 2007, was as follows:

"6(1)(a) in the case of goods specified in the [Second, and Third Schedules] at the rates specified therein and at all points of sale of such goods within the State (and in the case of goods specified below at the rate of twenty percent, at all points of sale of such goods within the State, namely:-

Sl.	Description of goods	HSN
(1)	(2)	(3)
1. Aerated Drinks		2201.10.10
(1) Mineral Water		***
(2) Packaged drinking water		2202.10
(3) Branded soft drinks,		8415
excluding soda		
2. Air conditioners		
3. Building Materials		

20. The State by various notifications under Section 6(1)(d) has notified list of goods taxable at the rate of 12.5%. Entry 71 which is relevant for the present case as notified by the State as existing prior to amendment by the S.R.O.No.119 of 2008 is as follows:

"71. Nonalcoholic beverages and their powders, concentrates and tablets including (I) aerated water, soda water, mineral water, water sold in sealed containers or pouches (ii) fruit juice, fruit concentrate, fruit squash, fruit syrup and fruit cordial [x x x] (v) other nonalcoholic beverages; not failing under any other entry in this List or in any of the Schedule.

(1) Water not containing added sugar or other sweetening matter; [x x x]

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(b) Aerated water

(2) Water containing added sugar or other sweetening matter.

2201 .10.20

(3) Fruit juices and vegetables juices, unfermented and not containing added spirit, whether or not containing added sugar of other sweetening matter

2009

(4) Fruit pulp or fruit juice based drinks

2202.90.30

(5) Soft drink concentrates

(a) Sharbat 2106.90.11; (b) other

2106.90.19

(6) Beverages containing milk

2202.90.30

20. The words "(iii) soft drinks of all varieties" omitted by S.R.O. No. 543/2007 dated 20607 published in Kerala Extraordinary No.1167 dt. 21.6.07

21. Omitted by S.R.O. No.543/2007 dt, 20607 published in Kerala Gazette Extraordinary No.1167 dt.2162007. Prior to the omission it read as under:

"(a) Mineral water 2201.10.10" "

21. Now, we come to Section 6(1)(a)(d) which exists as on date as:

"6.Levy of tax on sale or purchase of goods

(1) Every dealer whose total turnover for a year is not less than ten lakhs rupees and every importer or casual trader or agent of a nonresident dealer, or dealer in jewellery of gold, silver and platinum group metals or silver articles or contractor or any State Government, Central Government or Government of any Union Territory or any department thereof or any local authority or any autonomous body or any multilevel marketing entity, their distributor and/or agent engaged in multilevel marketing, whatever be his total turnover for the year, shall be liable to pay

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tax on his sales or purchases of goods as provided in this Act. The liability to pay tax shall be on the taxable turnover,-

(a)in the case of goods specified in the Second and Third Schedules at the rates specified therein and at all points of sale of such goods within the State and in the case of goods specified below, mentioned in column (4), at all points of sale of such goods within the States namely;

S.No.	***Description of Goods***	***HSN Code***	***Rates of Tax in percentage***
(1)	*(2)*	*(3)*	*(4)*
1.	*Cigars, Cheroots, cigarillos and cigarattes, of tobacco or of tobacco substitutes*	*2402*	*[30]*
2.	*Aerated branded soft drinks, excluding soda*	*****	*20*
3.	*[Carry bags made of plastic including polypropylene, which have a vest type self carrying feature to carry commodities]*	*****	*20*
[3A.	*Disposable plates, cups and leaves, made of plastic [3][including Styrofoam and Styrofoam sheets]*	*****	*20]*
[3B.	*Printed banners, hoardings and leaflets of Poly Vinyl Chloride/Polyethylene and other plastic sheets]*	*****	*20]*
4.	*Pan Masala*	*2106. 90.20*	*22.5*
5.	*Churna for pan*	*2106. 90.70*	*22.5*
6.	*Pan chutney*	*****	*22.5*
7.	*Other manufactured tobacco and manufactured tobacco substitutes*	*2403*	*22.5*

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homogenized or reconstituted tobacco; tobacco extracts and essences

Explanation: The 'Rules of Interpretation of the Schedules' appended to the Schedules of this Act shall apply to the interpretation of the HSN codes mentioned in this clause.

xxx xxx xxx xxx

(d) in the case of goods not falling under clause (a) or (c) at the rate of 14.5% at all points of sale of such goods within the State, Government may notify a list of goods taxable at the rate of 14.5%;"

22. A legislative history of Section 6(1)(a) clearly indicates that Section 6(1)(a) always covered 'aerated branded soft drinks'excluding soda'with tax liability of 20%.

23. By S.R.O.No.119 of 2008 Entry 71 has been substituted by another Entry. Entry 71 after amendment by S.R.O.No.119 of 2008 w.e.f. 1st April, 2007 is as follows:

"NONALCOHOLIC BEVERAGES AND THEIR POWDERS, CONCENTRATES AND TABLETS IN ANY FORM INCLUDING;

(1) Aerated water, soda water, Mineral water, water sold in sealed containers or pouches.

(2) Fruit juice, fruit concentrates, fruit squash, fruit syrup and pulp, and fruit cordial.

(3) Soft drinks other that aerated branded soft drinks.

(4) Health drinks of all varieties.

(5) 'Similar other products not specifically mentioned under any other entry in this list or any other schedule'."

24. As noted above the application was filed by the appellant under Section 94 of Act, 2003 on 24th August, 2014 which has been decided by the Committee of Joint Commissioner by order dated 6th November, 2015. Section 94 of the Act, 2003 is as follows:

"Section 94. Power of Authority to issue clarification. (1) If any dispute arises, otherwise than in a proceedings before any appellate or revisional authority or in any court or tribunal, as to whether, for the purpose of this Act,

(a) any person is a dealer; or

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(b) any transaction is a sale; or

(c) any particular dealer is required to be registered; or

(d) any tax is payable in respect of any sale or purchase, or if tax is payable, the point and the rate thereof; or

(e) any activity carried out in any goods amounts to or results in the manufacture of goods;

such dispute an authority consisting of three officers in the rank of Joint Commissioner or Deputy Commissioner nominated by the Commissioner on application by a dealer or any other person.

(1A) If the dispute relates to the tax rate of a commodity, the details of the first seller, or the manufacturer of such goods in the State, as the case may be, shall be furnished by the applicant and they shall be made necessary parties to such application.

(2) The Authority shall decide the question after giving the parties to the dispute a reasonable opportunity to put forward their case and produce evidence and after considering such evidence and hearing the parties.Pass orders
within three months or within such time as may be extended by the Commissioner. The Commissioner may considering the fact in issue decide whether such orders have prospective operation only.

... ...

25. We, thus, have to examine the classification of product in the light of provisions of Section 6(1)(a) and Entry 71 as existing after 1st April, 2007.**<u>Issue Nos.1 and 2</u>**

26. We consider both the issues together. According to Section 6(1) liability to pay tax shall be on the taxable turnover of every dealer as enumerated in subclause (a) to subclause (f). Subclause (a) provides that in the case of goods specified in the Second and Third Schedules tax shall be liable to be paid at the rate specified therein at all points of sale of such goods within the State.Subclause (a) further provides that in the case of goods specified in subclause (a) tax liability shall be at rate of specified in column (4).Subclause (a) contains chart which includes Sl.No., Description of goods, HSN Code and Rate of tax in percentage.The rate of tax as mentioned in in Section 6(1)(a) is 20% or more. The goods enumerated in Section 6(1)(a) are tobacco based goods, pan masala, other manufactured tobacco and manufactured tobacco substitutes. Other category contains plastic goods and goods made of polypropylene, Chloride/ Polyethylene and other plastic sheets. All goods enumerated in Section 6(1)(a) by the Legislature itself indicates that higher rate of tax has been fixed for those goods which are harmful for environment

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and health. Aerated branded soft drinks, excluding soda is also in the company of the above goods described in Section 6(1)(a). Section 6(1)(a) also refers to Schedule I, Schedule II and Schedule III. Tax in Schedule I is exempted and rate in Schedule II is 1% whereas rate of tax in Schedule III is 5% in contrast to legislative policy in fastening tax liability at very high level on goods under Section 6(1)(a) is thus clear and categorical. Those goods which are not congenial to health and environment are charged with higher tax level, which is the purpose and object clear from the legislative scheme.

27. Now we come to Section 6(1)(d).Section 6(1(d) empowers the State to notify a list of goods which are taxable at the rate of 12.5% (at present at 14.5%) which does not fall under clause (a) and (c).The delegated legislative power of issuing notification to the State Government is thus restricted and can be exercised only when goods do not fall under Section 6(1)(a) or Section 6(1)(c). The State of Kerala exercising its delegated legislative power has issued notification under Section Section 6(1)(d).

28. Now, we proceed to examine the legislative history of both Section 6(1)(a) and Entry 71 and the legislative changes effected from time to time. Prior to substitution of Section 6(1)(a) by Kerala Finance Act, 2007 w.e.f. from 1st April, 2007. Section 6(1)(a) read as follows:

> "(a) in the case of goods specified in the [Second, and Third Schedules] at the rates specified therein and at all points of sale of such goods within the State (and in the case of goods specified below at the rate of twenty percent, at all points of sale of such goods within the State, namely:-

Sl. Description of

goods HSN

No. Code

(1) (2) (3)

1. Aerated
Drinks 2201.10.10

(1) Mineral Water ***

(2) Packaged drinking water 2202.10

(3) Branded soft drinks, 8415
excluding soda

2. Air conditioners

3. Building Materials

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29. The aerated branded soft drinks, excluding soda were always covered under Section 6(1)(a)and prior to 1st April, 2007 it bears HSN Code 2201.10.10. Entry 71 Item 4 also reads as “fruit pulp or fruit juice based drinks with HSN Code 2202.90.20”.When fruit juice based drinks were covered under Entry 71 the State Government knew that fruit juice based drinks were not covered by Section 6(1)(a). Applicability of the power of State to issue notification under Section 6(1)(d) arises only when goods were not covered by Section 6(1)(a). Fruit juice based drinks, thus, were never treated as 'aerated branded soft drinks' which was the understanding of State of Kerala while issuing notification under Section 6(1(d). Had fruit juice based drinks were also to be covered by aerated branded soft drinks, there was no occasion for subordinate legislative authority, i.e., the State Government, to include such products in notification under Section 6(1)(d).30. Now, we come to Entry 71 which was substituted by S.R.O. No.119 of 2008 dated 24.1.2008 w.e.f. 01.04.2007, which is to the following effect:

> *"71.Nonalcoholic beverages and their powders, concentrates and tablets in any form including:*
>
> *(1) aerated water, soda water, mineral water, water sold in sealed containers or pouches;*
>
> *(2) Fruit juice, fruit concentrates, fruit squash, fruit syrup and pulp and fruit cordial;*
>
> *(3) Soft drinks other than aerated branded soft drinks;*
>
> *(4) Health drinks of all varieties;*
>
> *(5) Similar other products not specifically mentioned under any other entry in this list or in any other Schedules.”*

31. A bare perusal of Entry 71 as above indicates that the Entry covers nonalcoholic beverages and their powders, concentrates and tablets in any form including Item No.2 contains fruit juice, fruit concentrates, fruit squash, fruit syrup and pulp and fruit cordial. Soft drinks other than aerated branded soft drinks are included in Item No.3. Health drinks of all varieties are included in Item No.4 and similar other products not specifically mentioned under any other entry in this list or in any other Schedules were included in Item No.5.The Entry of fruit juice based drinks got subsumed in the residuary entry and the amendment by S.R.O.No.119 of 2008 did not change or affect the character and content of the products which were included in Entry 71.

Issue No.3

32. The High Court while interpreting the entries under Section 6(1)(a) and Entry 71 of the notification S.R.O.No.119 of 2008 had applied common parlance test.The High Court has also relied on Rules of Interpretation as contained in the Appendix to Schedule to Act, 2003.From the Appendix following Rule of Interpretation was extracted:

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“RULES OF INTERPRETATION OF SCHEDULES

The commodities in the schedules are allotted with Code Numbers, which are developed by the International Customs Organization as harmonized System of Nomenclature (HSN) and adopted by the Customs Tariff Act, 1975. However, there are certain entries in the schedules for which HSN Numbers are not given.

Those commodities which are given with HSN Number should be given the same meaning as given Customs Tariff Act, 1975. Those commodities, which are not given with HSN Number, should be interpreted, as the case may be, in common parlance of commercial parlance. While interpreting a commodity, if any consistency is observed between the meaning of a commodity without HSN Number and the meaning of a commodity with HSN Number, the commodity should be interpreted by including it in that entry which is having the HSN Number.”

33. Applying the common parlance test, the High Court has concluded that product in question is covered by 'aerated branded soft drink'.Strictly speaking the Rule of Interpretation which is given in the Appendix to Act, 2003, are the Rules of Interpretation of Schedules that is Schedule Nos.I, II and III. Thus, for interpretation of any item in the Schedule, Rules of Interpretation as given in the Appendix are applicable.The items which fall for consideration in the present case is Item No.6(1)(a) as well as Entry 71 of S.R.O. No.119 of 2008 issued in exercise of power under Section 6(1)(d), which are the entries which are not mentioned in the Schedule.One more provision which is relevant to notice is the explanation to Section 6(1)(a). The explanation to Section 6(1) (a) provides as follows:

“Explanation: The 'Rules of Interpretation of the Schedules' appended to the Schedules of this Act shall apply to the interpretation of the HSN codes mentioned in this clause.”

34. Although the above Explanation applies the Rules of Interpretation of the Schedules to the interpretation of the HSN codes mentioned in Section 6(1)(a) but Explanation does not say anything about the items where HSN code is not there. The Rules of Interpretation of the Schedules, thus, directly are not attracted with regard to the interpretation of the entry which does not mention with HSN code in Section 6(1)(a) although principle contained in such Rules of Interpretation may apply. Had the legislation intended the Rules of Interpretation of the Schedules should be made applicable both to the interpretation of the Schedules or those commodities which are not given with HSN code, the Rules of Interpretation of Schedules should have been in toto made applicable for interpretation of clause (a) of Section 6(1). Thus, common parlance test or commercial test which are to be applied on the commodities in the Schedules which are not given with HSN code is directly not applicable under Item 6(1)(a), hence, applicability of other Rules of Interpretation which were required to be applied is not ruled out.Hence, in the appropriate case

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apart from common parlance test or commercial test any other test can be applied for interpretation of the commodities included in Section 6(1)(a) apart from those which are given HSN code.

35. The principle of statutory interpretation with regard to a word in taxing statutes are well established. This Court in Porritts & Spencer (Asia) Ltd. vs. State of Haryana, 1979(1) SCC 82, has laid down following in paragraph 6:

> *"6 Where a word has a scientific or technical meaning and also an ordinary meaning according to common parlance, it is in the latter sense that in a taxing statute the word must be held to have been used, unless contrary intention is clearly expressed by the Legislature."*

36. This Court had also occasion to interpret the entries in taxing statute which has also technical meaning. In this context, reference is made to judgment of this Court reported in Collector of Akbar Badruddin Jiwani vs. Collector of Customs, 1990 (47)ELT 161 ,the Court had occasion to consider a term as occurring in Tariff Item No.25.15 of Appendix IB, Schedule 1 to the Import (Control) Order, 1955. The Court held commercial nomenclature or trade understanding inapplicable to the term. While considering the aforesaid case the Court had occasion to consider several earlier cases of this Court. Following was stated in paragraphs 36,37,40,41,42, 43:

> *"36. In deciding this question the first thing that requires to be noted is that Entry 25.15 refers specifically not only to marble but also to other calcareous stones whereas Entry 62 refers to the restricted item marble only. It does not refer to any other stones such as ecaussine, travertine or other calcareous monumental or building stone of a certain specific gravity.Therefore, on a plain reading of these two entries it is apparent that travertine, ecaussine and other calcareous monumental or building stones are not intended to be included in 'marble' as referred to in Entry 62 of Appendix 2 as a restricted item. Moreover, the calcareous stones as mentioned in ITC Schedule has to be taken in scientific and technical sense as therein the said stone has been described as of an apparent specific gravity of 2.5 or more. Therefore, the word 'marble' has to be interpreted, in our considered opinion, in the scientific or technical sense and not in the sense as commercially understood or as meant in the trade parlance. There is no doubt that the general principle of interpretation of tariff entries occurring in a text (sic tax) statute is of a commercial nomenclature and understanding between persons in the trade but it is also a settled legal position that the said doctrine of commercial nomenclature or trade understanding should be departed from in a case where the statutory content in which the tariff entry appears, requires such a departure. In other words, in cases where the application of commercial meaning or trade nomenclature runs counter to the statutory context in which the said word was used then the said*

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principle of interpretation should not be applied. Trade meaning or commercial nomenclature would be applicable if a particular product description occurs by itself in a tariff entry and there is no conflict between the tariff entry and any other entry requiring to reconcile and harmonise that tariff entry with any other entry.

37. In Union of India v. Delhi Cloth & General Mills1 the question arose as to how the term "refined oil" occurring in the tariff was to be construed. There was no competition between that tariff entry with any other, nor was there any need to reconcile and harmonise the said entry with any other provision of the tariff. This Court, therefore, considered the term "refined oil" by applying the commercial meaning or trade nomenclature test and held that only deodorised oil can be considered to be refined oil. This Court also referred to the specification of "refined oil" by the Indian Standards Institution and held that:

"This specification by the Indian Standards Institution furnishes very strong and indeed almost incontrovertible support for Dr Nanji's view and the respondents' contention that without deodorisation the oil is not "refined oil" as is known to the consumers and the commercial community."

... ...

40. It may be pointed out that this Court has clearly and unequivocally laid down that it is not permissible but in fact it is absolutely necessary to depart from the trade meaning or commercial nomenclature test where the trade or commercial meaning does not fit into the scheme of the commercial statements. This Court referring to the observation of Pullock, B. in Gren fell v. Inland Revenue Commissioner observed: (quoted at SCR p.724)

"that if a statute contains language which is capable of being construed in a popular sense such statute is not to be construed according to the strict or technical meaning of the language contained in it, but is to be construed in its popular sense, meaning of course, by the words 'popular sense', that sense which people conversant with the subject matter with which the statute is dealing would attribute to it." But "if a word in its popular sense and read in an ordinary way is capable of two constructions, it is wise to adopt such a construction as is based on the assumption that Parliament merely intended to give so much power as was necessary for carrying out the objects of the Act and not to give any unnecessary powers. In other words, the construction of the words is to be adapted to the fitness of the matter of the statute."

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41. The court has also referred to the observation of Fry, J.in Holt & Co. v. Collyer. The observation is: "If it is a word which is of a technical or scientific character then it must be construed according to that which is its primary meaning, namely, its technical or scientific meaning."

Referring to the above decisions this Court held that:

"[W]hile construing the word 'coal' in Entry I of Part III of Schedule II, the test that would be applied is what would be the meaning which persons dealing with coal and consumers purchasing it as fuel would give to that word. A sales tax statute being one levying a tax on goods must in the absence of a technical term or a term of science or art, be presumed to have used an ordinary term as coal according to the meaning ascribed to it in common parlance."

42. This Court in K.V. Varkey v. Agricultural Income Tax and Rural Sales Tax Officer specifically declined to apply the popular or commercial meaning of 'Tea' occurring in the sales tax statute holding that the context of the statute required that the technical meaning of 'a product of plaint life' required to be applied and therefore green tea leaves were tea even though they might not be tea as known in the market.

43. In Cannanore Spinning and Weaving Mills Ltd. v.Collector of Customs and Central Excise, Cochin this Court held that the word 'hank' occurring in a Central Excise Notification could not be interpreted according to the well settled commercial meaning of that term which was accepted by all persons in the trade, inasmuch as the said commercial meaning would militate against the statutory context of the said exemption notification issued in June 1962.

The word 'hank' as used in the notification meant a 'coil of yarn' and nothing more."

37. In the cases as noted above this Court departed from construing the entry from its normal commercial meaning but had adopted a technical or scientific meaning. Ultimately, in paragraph 53 of this judgment, the Court gave the technical and scientific meaning to the entry and common parlance and commercial parlance test was not adhered to:

"53. It is apparent from all these reports that the calcareous stone of specific gravity of 2.5 is not marble technically and scientifically. The finding of the Appellate Tribunal is, therefore, not sustainable. It is, of course, well settled that in taxing statue the words used are to be understood in the common parlance or commercial parlance but such a trade understanding or commercial nomenclature can be given only in cases where the

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word in the tariff entry has not been used in a scientific or technical sense and where there is no conflict between the words used in the tariff entry and any other entry in the Tariff Schedule."

38. In the present case, the Entry 2 under Section 6(1)(a) uses the word 'aerated'. This is scientific term and has been repeatedly used in different statutes including the Central Excise Tariff and different HSN codes also uses the term 'aerated'. The word 'aerated'is scientific and technical word used under different statutes and the scientific and technical meaning of the word 'aerated'can be looked into for finding out the real import of the Entry.

39. In view of the above, we are of the opinion that common parlance and commercial parlance test was not the only test which could have been applied for interpreting the entries in items mentioned in Section 6(1)(a) and the entries which contain scientific and technical word were also to be looked into in technical and scientific meaning. Both the High Court and the Committee of Joint Commissioners discarded the evidence of technical and scientific meaning of word. The appellant has rightly relied on the technical evidence brought on the record which indicate that use of carbon dioxide to the extent of 0.6 per cent was only for the purpose of preservative in packaging the commodities and the product was thermally processed and carbon dioxide was added to as the preservative.

Issue No.4: Principle of 'Noscitur a Sociis'

40. The appellants before the Committee of Commissioners as well as High Court have pleaded that Entry 71 Item 5 mentioned "similar other products not specifically mentioned under any other entry in this list or any other schedule", was required to be considered in the light of commodities as included in other items mentioned in Entry 71. It was submitted that 'Appy Fizz' which a fruit juice based drink is more akin to other commodities included in the Entry 71 other than that which was included in Section 6(1)(a). In interpreting Item 5 of Entry 71 the doctrine of 'noscitur a sociis'is fully attracted.**Justice**

G.P.Singh in 'Principles of Statutory Interpretation, 14th Edition, has explained the 'noscitur a sociis'in the following words:

"(b)Noscitur a Sociis

The rule of construction noscitur a sociis as explained by LORD MACMILLAN means: "The meaning of a word is to be judged by the company it keeps". As stated by the Privy Council: "It is a legitimate rule of construction to construe words in an Act of Parliament with reference to words found in immediate connection with them". It is a rule wider than the rule of ejusdem generis; rather the latter rule is only an application of the former. The rule has been lucidly explained by GAJENDERAGADKAR, J., in the following words: "This rule, according to MAXWELL, means that when two or more words which are susceptible of analogous meaning are coupled together, they are understood to

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be used in their cognate sense. They take as it were their colour from each other, that is, the more general is restricted to a sence analogous to a less general. The same rule is thus interpreted in Words and Phrases." "Associated words take their meaning from one another under the doctrine of noscitur a sociis, the philosophy of which is that the meaning of the doubtful word may be ascertained by reference to the meaning of words associated with it; such doctrine is broader than the maxim ejusdem generis." In fact the latter maxim "is only an illustration or specific application of the broader maxim noscitur a sociis'. It must be boren in mind that noscitur a sociis, is merely a rule of construction and it cannot prevail in cases where it is clear that the wider words have been deliberately used in order to make the scope of the defined word correspondingly wider. It is only where the intention of the Legislature in associating wider words with words of narrower significance is doubtful, or otherwise not clear that the present rule of construction can be usefully applied."

41. This Court in **Pardeep Aggarbatti Vs. State of Punjab, 1997 (96) E.L.T. 219(S.C.),** considering Entry 16 of Schedule A of Punjab General Sales Tax Act, 1948, in paragraph 9 has laid down following:

"9 . Entries in the Schedules of Sales tax and Excise statutes list some articles separately and some articles are grouped together. When they are grouped together, each word in the Entry draws colour from the other words therein. This is the principle of noscitur a sociis."

42. Applying the aforesaid principle of construction of 'noscitur a sociis'on Entry 71, it is clear that clause 5 of Entry 71 has to take colour and meaning from the other items included in Entry 71. Item 5 of Entry 71 uses the words "similar other products not specifically mentioned under any other entry in this list or any other schedule". Thus, the products which are to be covered under Item No.5 are similar other products. When Item No.2 of the Entry 71 that is fruit juice, fruit concentrates, fruit squash, fruit syrup and pulp, and fruit cordial and item No.4 that is health drinks of all varieties, are kept in mind the fruit juice based drink shall fall in Item No.5.Both High Court and Committee of Commissioners overlooked this principle while interpreting item No.5 of Entry 71.

Issue No.5

43. The appellant in application under Section 94 of the Act, 2003 filed several materials, expert opinions and pleadings for classifying the product in question. The Committee of Commissioners although in its order has noted several contentions raised by the appellant but the Committee of Commissioners mainly relying on the judgment of Division Bench of Kerala High Court in OT Revision No.114 of 2013M/s.Trade Lines finalised the assessment by levying tax on the product 'Appy Fizz'at the rate of 20% against which M/s.Trade Lines

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has filed an appeal which was dismissed and thereafter Revision was filed in the High Court and the High Court dismissed the Revision affirming the assessment made at the rate of 20% tax. Proceeding under Section 94 of Act, 2003 is a separate and specific proceeding. In the present case when the appellant has filed application under Section 94 the judgment of Division Bench in M/s. Trade Lines was already rendered and in a writ petition filed by the appellant learned Single Judge has issued a direction on 31st August, 2015 for deciding the application under Section 94. The direction issued by the learned Single Judge to decide the application was challenged by the Revenue before the Division Bench and the Division Bench contending that Single Judge ought not to have issued the direction since the matter had been decided in the High Court in M/s. Trade Lines (supra). The Division Bench rejected the said contention and dismissed the writ appeal on 15th October, 2015 and in paragraph 4 of the judgment has dealt with the judgment of M/s. Trade Lines to the following effect:

> *4....The socalled revisional order passed by this Court in yet another case would not also have the efficacy of depleting the jurisdiction of the authority under Section 94 of the KVAT Act to issue clarification. The very purpose of the provision in the form of Section 94 and clothing authority with power to make different nature of considerations to conclude such issues, necessarily, show that no revisional order of this Court in an earlier proceedings could conclude the issues which could be considered in an application for clarification by the competent authority under Section 94 of the KVAT Act."*

44. The order passed by the Division Bench in M/s. Trade Lines was a case of assessment of another assessee which decision was based on the materials brought on the record by the said assessee and could not have precluded the appellant from filing the application under Section 94 and when the Division Bench by its judgment of 5th October, 2015 dismissed the appeal of the Revenue, the Committee of Commissioners ought to have followed the observation given by the Division Bench in paragraph 4 quoted above. Thus, we are of the view that the judgment of the Division Bench of Kerala High Court in M/s.Trade Lines did not conclude the issue and the Committee of Commissioners was not absolved from its duty of deciding the same in accordance with the materials brought on the record by the appellant and although the Committee noticed all the pleadings and contentions but mainly relying on the ruling of M/s.Trade Lines dismissed the clarification application which cannot be sustained.

<u>Issue No.6.</u>

45. Appellant had relied on the order of CESTAT dated 18.03.2008 reported in 2008 (226) ELT 194(TribunalDelhi) which was in appeal filed by the Commissioner of Central Excise, Bhopal against the M/s. Parle Agro Pvt. Ltd.regarding classification of the same product 'Appy Fizz'and the order passed by the Commissioner(Appeals) whereby it was held that product 'Appy Fizz'is classifiable under subheading No.22029020 of Central Excise Tariff on

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the ground that the product is fruit juice based drink. Revenue challenged the order on the ground that the same is classifiable under subheading No.22021010 of Central Excise Tariff as 'aerated water'.The Tribunal vide its judgment dated 18.03.2008 dismissed the appeal.The order in paragraph 5 has referred to relevant subheading No.220210 and 22029020 on which Revenue had relied is to the following effect: “2202 10 Waters, including mineral waters and aerated waters, containing added sugar or other sweetening matter or flavoured: 22029020 Fruit pulp or fruit juice based drinks “

46. The Revenue has contended that product in question is aerated.The contention of the Revenue was noted in paragraph 3 of the judgment which is to the following effect:

"3 . The contention of the Revenue is that the Commissioner (Appeals) has ignored the chemical examiner's report and Ministry of Food and Processing Industries opinion and which was on record and Ministry of Food and Processing Industries opinion and which was on record and held in favour of the respondents. The contention of the Revenue is that since the product in question is aerated, therefore, is classifiable as flavoured aerated water.The Revenue also relied upon the HSN Explanatory notes in support of their claim.”

47. The above contention was rejected by the CESTAT and following was held in paragraph 6:

> *"6. The Revenue relied upon HSN Explanatory Notes of Chapter 22.WE find that our tariff is not fully aligned with the HSN Explanatory Notes.In the HSN Explanatory Notices there are two subheadings under Heading No.2202 one is “water including mineral waters and aerated waters, containing added sugar or other sweetening matter or flavoured” and second is in respect of others.Whereas Central Excise Tariff under Subheading No .2202 there are specific headings in respect of soya milk, drinks etc. As per the Central Excise Tariff, the waters; including mineral waters and aerated waters, containing added sugar or other sweetening matter or flavoured are classifiable under subheading No.2202.10.The drinks based on fruit juice are specifically classifiable under Heading No.22029020 of the Tariff. In the present case, there is no dispute regarding the contents of the product.Revenue is not disputing the certificate given by the Ministry of Food and Processing Industries, New Delhi rather they are relying it in the ground of appeal, and as per the certificate, the product in question contains 23% of apple juice, therefore, we find no infirmity in the impugned order. The appeal is dismissed.”*

48. The Revenue had also filed Civil Appeal No.5354 of 2008 against the order of CESTAT which was dismissed by this Court on 8th July, 2009 affirming the order of CESTAT.

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49. The judgment of CESTAT and the order of the Supreme Court were specifically relied by the appellant before the High Court.The High Court without giving cogent reason has refused to rely on the said adjudication.It may be said that the adjudication by the CESTAT was with regard to the HSN Code which found place in Central Excise Tariff Act.The competent entry under which CESTAT authorities were to adjudicate regarding the product has already been extracted "Fruit pulp or Fruit juice based drink" on which CESTAT had ruled that product is not included in aerated water and was included in entry as fruit juice based drink. The product was not held to be aerated water was a relevant fact to be considered even though in the entries under the Act, 2003, now there are no HSN Codes mentioned.

50. Even though the order of CESTAT did not conclude the controversy in favour of the appellant but fact that the CESTAT did not hold the product to be under the "aerated water" was a factor which necessitated a more deeper consideration by the High Court to find out as to whether the product is 'aerated branded soft drink'or not.The High Court in its judgment found that since the product charged with air or carbon dioxide was an aerated drink. From the manufacturing process which was on the record, it is clear that carbon dioxide to the extent of 0.6 percent was added as preservative. Technical note submitted on behalf of the appellant clearly mentioned that use of carbon dioxide was only as a preservative of 'Appy Fizz'.

<u>Issue Nos.7 & 8</u>

51. The appellant had been granted the licence to manufacture the product under Fruit Products Order 1955. The appellant has been labelling the product as 'Fruit Drink'under the Food Safety and Standards (Food Safety & Standards and Food Additives) Regulations, 2011. The statutory regulations require that beverages must contain minimum of 10% fruit juice to be called a Fruit Drink.Regulation 2.3.10 of 2011 Regulations described as 'Thermally Processed/Fruit Beverages/ Fruit Drink ready to serve Fruit Beverages to the following effect:

> *"2.3.10: Thermally Processed Fruit Beverages/Fruit Drink/ Ready to Serve Fruit Beverages 1. Thermally Processed Fruit Beverages/Fruit Drink/ Ready to Serve Fruit Beverages (Canned, Bottled, Flexible Pack And /Or Aseptically Packed) means an unfermented but fermentable product which is prepared from juice or Pulp/Puree or concentrated juice or pulp or sound mature fruit. The substances that may be added to fruit juice or pulp are water, peel oil, fruit essences and flavours, salt, sugar, invert sugar, liquid glucose, milk and other ingredients appropriate to the product and processed by heat, in an appropriate manner, before or after being sealed in a container, so as to prevent spoilage.*
>
> *2. The product may contain food additives permitted in these regulations including Appendix A. The product shall conform to*

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the microbiological requirements given in Appendix B. The product shall meet the following requirements:-

(i) Total Soluble Solid (m/m) Not less than 10.0 percent

(ii) Fruit Juice content (m/m)

(a) Lime/Lemon ready to serve beverage Not less than 5.0 percent

(b) All other beverage/drink Not less than 10.0 percent

" ... ...

52. It is on the record that the contents of food product of 'Appy Fizz'are more than 10%. In Section 94 proceedings the appellant has filed letter of the Government of India dated 28.03.2005 containing the "Subject :Opinion for the product

as 'Appy Fizz'". In the letter the Government stated the following:

"This is with reference to your letter No.KSDELPAL dated 4th March, 2005 on the above mentioned subject.There are three categories of products specified under the Fruit Products Order, 1955 which are relevant to your products.

1.Ready to serve beverages including aerated waters containing Fruit Juice.The product should contain a minimum of 10% of fruit juice.The product is commonly known as fruit drink.

2.Flavored sweetened aerated waters. The product which contains less than 10% of ..sic.. & vegetable extractives is included in this category. The product is commonly known as soft drink such as Pepsi Cola, Coca Coin etc.

3.Sweetened aerated mixtures containing fruit juice or bits. The product should contain a maximum of 10% of fruit juice or pulp or bits. This category of product technically is same as at serial no.1."

53. Thus, according to the Government of India, Ministry of Food Processing Industries the product containing 10% of fruit juice are commonly known as fruit drinks.The appellant has also filed the order of 19th August, 2015 issued by the Food Safety and Standards Authority of India, Ministry of Health & Family Welfare where following permission was granted by Food Safety and Standards Authority of India, Ministry of Health & Family Welfare by order dated 19th August, 2015:

"*It is to inform you that you are now allowed to Manufacture, Store and Sale the product 'Appy Fizz' in pet bottles under the*

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category2.3.10 i.e. Thermally Processed Fruit Beverages/Fruit Drink/Ready to serve Fruit Beverages of Food Safety and Standards (Food Product Standards & Food Additives) Regulations, 2011 with name of the food item as Fruit Pulp or Fruit Juice based Drinks for which you are already holding a license."

54. The Committee of the Joint Commissioners while deciding the application under Section 94 has noted the aforesaid orders passed by the Food Safety Authorities which were relied by the appellant but it discarded the above said orders and opinion relying on the order passed by the Kerala High Court in the case of M/s.Trade Lines decided on 17.11.2014 and held that the product is taxable at the rate of 20% as per Sl.No.2 of Section 6(1)(a).

55. What is the process for manufacture in accordance with the Food Safety and Standards Act, 2011 and the Regulations framed therein and what is the nature and characteristic of the product which has been licensed to be manufactured to the appellant cannot be said to be an irrelevant factor while examining the nature and contents of the product. Whether the product is an aerated branded soft drink or can be covered by residuary of clause (5) of Entry 71 is a question on which the manufacture licence, orders issued by Food Safety and Standards Authority of India were relevant facts which were although cited before the Committee of Joint Commissioners but were brushed aside relying on the Kerala High Court's order in M/s.Trade Lines. We, thus, are of the opinion that the manufacture licence dated 19th August, 2015 granted to appellant and the opinion of the Government of India, Ministry of Food Processing Industries dated 28.03.2005 were relevant for finding the nature of the product of the appellant for the purpose of classification and the Committee of Joint Commissioners as well as High Court erred in not adverting to and considering the aforesaid material.

56. The appellant has also before the Committee of Joint Commissioners produced the technical certificates. The Food Safety and Standards (Food Products Standards & Food Additives) Regulations, 2011 in clause 2.3.10 deals with thermally processed fruit beverages/fruit drink ready to serve fruit beverages which has already been extracted above.The appellant has filed a certificate dated 11.06.2015 from the Institute of Chemical Technology. It is useful to refer to the above certificate which is to the following effect:

"INSTITUTE OF CHEMICAL TECHNOLOGY

ICT/FET/USA/1590

June 11, 2015

TO WHOMSOEVER IT MAY CONCERN

Technical opinion on the product Appy Fizz manufactured by PARLE AGRO PVT LTD.

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Appy Fizz is a fruit product manufactured using apple juice concentrate as a fruit juice source. The ingredients declared on the label include Water, Sugar, Apple Juice concentrate, Carbon dioxide(290), malic acid, citric acid, preservatives (sodium benzoate, potassium metabisulphite and potassium, sorbate), ascorbic acid and added nature identical flavouring substances and natural colour. The juice content of APPY FIZZ is 12.7% m/m and Total solids content is 13%. The product is manufactured under FSSAI licence category Ready to Serve fruit beverage/drink.

The manufacturing process involves the following steps:-

1.Addition of all the ingredients to treated water, except carbon dioxide and making a batch.

2. Thermal Process (Pasteurization) of the product at 950 C for 30 seconds and cooling to 40 C.

3.Purging Carbon dioxide gas into the product.

4.Filing the product into bottles/cans followed by sealing/seaming.

5.Filed bottles/cans are then passed through warmer to increase the temperature to room temperature followed by labeling and coding.

The technical opinion is given with considering following two points:

POINT NO.1:

Technical Opinion on why the category of the product should be FSSAI(Food Product Standards and Food Additives)

Regulations, 2011 chapter 2.3.10(Thermally processed Fruit Beverages/Fruit drink/Ready to serve fruit beverage)

- It is made from apple juice concentrate.
- It compiles with respect to the juice content and solids content percentage which is more than 10% required as per the 2.3.10.
- It mentions CONTAINS APPLE JUICE on the label.
- It is thermally processed beverage.
- It has substances mentioned ..sic.. other ingredients appropriate to the product.
- After the Thermal processing the ready ..sic.. as required in 2.3.10 Carbon Dioxide is purged in the beverage FRUITS action of preservation to create an environment which will help to prevent spoilage during itself life.

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POINT NO.2:

Technical Opinion on why the category of the product should NOT be classified under FSSA (Food Product Standards as Food additives) Regulation, 2011 chapter 2.3.30 (Carbonated Fruit beverage / drink) OR 2.10.6.1 (Carbonated Fruit beverage/drink) OR 2.10.6.1 (Carbonated Water)

- APPY FIZZ is not a synthetic carbonated wate.
- APPY FIZZ contains reconstituted natural apple juice made from apple juice concentrate.
- APPY FIZZ is thermally processed (Pasteurization).
- Thermal process is not mentioned in 2.3.30 and 2.10.6.1
- APPY FIZZ are not contain artificial sweeteners/caffeine as allowed in 2.10.6.1.

Carbon dioxide(INS 290/E 290) is mentioned as a Packing gas/propellant/carbonating agent/preservative/foaming agent by CODEX ALIMENTATIRUs and its use is allowed as per GMP.

Carbon dioxide along with other preservatives help in extending the shelf life of the product as the product is filed in PET bottles/cans and is not filled aseptically.

Conclusion:

In view of the above mentioned points, I am of the opinion that the APPY FIZZ is a THERMALLY PROCESSED FRUIT BEVERAGE/READY TO SERVE FRUIT BEVERAGE complying with category 2.3.10 as per FSSAI Regulations, 2011 despite having carbon dioxide as an ingredient which is used for preservation purpose only.This opinion is purely based on scientific and technical information however ICT will not be part of any court conflicts.

Sd/11.6.2015

Dr.Uday S.Annapure,

Associate Professor,

Dept. of Food Engineering & Technology,

Institute of Chemical Technology Matunga, Mumbai400 019."

57. The above technical opinion clearly mentioned that carbon dioxide is used for preservation purpose only.Before the Committee of Commissioners the entire process of manufacture of the product was explained along with all relevant orders and certificates of Food Safety Authorities.It was stated that the Experts in their opinions and certifications have mentioned that product is

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commercially and technically distinct from products which have classified as 'aerated branded soft drinks'. The certifications which were relied by the appellant indicate that in the case of 'Appy Fizz'the product does not undergo aeration or carbonation; the product is thermally processed with CO2 which help in preserving the Apple Juice concentrate which is otherwise perishable in nature.

58. In the application which was filed for clarification, which has been brought on the record at page 138Annexure P13, in paragraph 3.1 elaborate process of manufacture was mentioned.

59. Other relevant materials which were part of the clarification application were mentioned in clause 6 which are to the following effect: “VI. OTHER RELEVANT MATERIAL

> *(a) Technical opinion dated 28.02.2005 issued by the authority under Fruit Processing Order, 1955 i.e. Director Food & Vegetable Processing Industry working as licensing officer under Fruit Product Order 1955 in ministry of Food Processing Industries, Government of India.(Copy of the said certificate is enclosed herewith as Exhibit H)*
>
> *(b) Permission given for manufacture, storage and sale of product to the factory at Varanasi issued by Central Licensing Authority having their office at Lucknow under letter dated19.08.2015 confirming the classification of product “Appy Fizz” under category 02.03.2010 i.e. Fruit Juice based Drink and also held that we are already holding a license. (Copy of the said letter is enclosed herewith as Exhibit I)*
>
> *(c) Technical expert opinion issued by Professor Dr. Uday S. Annapure dated 11.06.2015 classifying the said product as ready to serve Fruit beverage falling under the category of 02.03.2010 of FSSAI Regulation 2011 and specifically stated that “Appy Fizz” is not Carbonated Water. Exhibit J.*
>
> *(d) Technical Note and Photographs explaining the use of impregnated Carbon Dioxide for the purpose of preservation as well as for the strengthening the wall of PET bottles due to expansion of Carbon Dioxide from inside providing the strength to wall of PET bottle during the transit so as to withstand with the handling hazards while delivering the product to remote area. Note and photocopies are enclosed herewith as Exhibit K and L Colly.*
>
> *(e) Classification of the product “Appy Fizz” has been recognized by a legislative body of Kerala Government based on the white paper issued by empowered committed of state Finance Minister while introducing the White Paper on 17.01 .2005 and has issued the Original Notification SRO 82 of 2006 dated 21.01.2006 and*

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classified the product based on Central Excise Tariff which interalia is based on HSN at Entry no.71 Sr.No.4 as Fruit Juice Based Drink. Copy of the said Notification and White Paper is enclosed herewith as Exhibit M and Exhibit N Colly.

(f) The said classification under Entry No.71 sr.No.4 of the product under Kerala VAT remained in Entry No.71 at Sr.5 despite the substitution brought by Notification SRO 119 of 2008 dated 24.01.2008. (Copy of the said Notification is enclosed herewith as Exhibit O)

(g) The Kerala VAT dept. had raised an issue regarding the classification of the product Appy Fizz in 2009. However, the Company had explained the reason as to why the product Appy Fizz has been classified as a fruit juice based drink. The said explanation of the company has been accepted and no order has been passed by the KVAT Department, accepted assessment order passed by assessing officer Exhibit P.

(h) The said assessment orders have attained the finality being not challenged by the department.

(i) As per subsection(1A) of Section 94 of Kerala VAT Act, 2003 which interalia contemplates that if the dispute relates to tax rate of a commodity the details of first seller or the manufacturer of such goods in the state as the case may be shall be furnished by the applicant. Accordingly, we are submitting sales tax Assessment order under Tamilnadu VAT Act since the manufacturer is located in Tamilnadu, Exhibit Q. Hence, the said party may please be made a necessary party.

(j) The issue of classification of the product "Appy Fizz" is decided by Hon'ble Kerala High Court in case of other dealer namely Trade Lines. However, Hon'ble Kerala High has decided that in Revision and the facts of our case are totally different and therefore, as per the settled law the decision is binding only when the facts are same and not when the facts are different and therefore, in our case the facts which are totally different were not subject matter of consideration before Hon'ble High Court."

60. The above materials which were filed by the appellant before the Clarification Authority were relevant materials for understanding the manufacture process and the nature and contents of ultimate product. The expert authority and its opinion which were relied by the appellant were required to be adverted to both by the Clarification Authority as well as by the High Court and we are of the opinion that expert opinion and materials have been erroneously discarded.

61. It is further relevant to note that Revenue has not filed any material on the record either before the Clarification Authority or before the High Court in

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support of its view that product is covered under Section 6(1)(a) that is 'aerated branded soft drink'. This Court in several cases has observed that onus to prove that particular goods fall in particular tariff item is on the Revenue. In this context, in the judgment of this Court in Hindustan Ferodo Ltd. vs. Collector of Central Excise, Bombay, 1997(89) ELT 16(SC), in paragraph 3 it was laid down:

> *"3. It is not in dispute before us,as it cannot be, that the onus of establishing that the said rings fell within Item 22F lay upon the Revenue. The Revenue led no evidence. The onus was not discharged. Assuming therefore, that the Tribunal was right in rejecting the evidence that was produced on behalf of the appellants, the appeal should, nonetheless, have been allowed."*

62. We, thus, conclude that orders of Food Safety Authority and expert opinion regarding process of manufacture relied by the appellant were relevant materials and Clarification Authority and High Court erred in law in discarding these materials.

Issue No.9 : CONCLUSION

63. While referring to Section 6(1)(a) and Section 6(1)(d) we have already noticed that the power of the State Government to issue notification under Section 6(1)(d) arises "in the case of goods not falling under clause (a) or (c)".After enactment of Act, 2003 Section 6(1)(a) from the very beginning included 'aerated branded soft drink'. The inclusion of fruit juice based drinks in Entry 71 clearly proved that fruit juice based drinks were never treated to be included in 'aerated branded soft drinks'. Had fruit juice based drinks were also included in 'aerated branded soft drinks', the State could not have exercised its power under Section 6(1)(d) to include such products in Entry 71. Whether after amendment of Entry 71 by S.R.O. No.119 of 2008 something which was earlier included in Entry 71 shall now stand transferred to Section 6(1)(a) is the question to be answered. Even though Entry 71 has been amended but there is no amendment in Entry 2 of Section 6(1)(a), so as to include something not included in Section 6(1)(a). By S.R.O. No.119 of 2008, residuary entry by Item No.5 is added which is

"similar other products not specifically mentioned under any other entry in this list" which is potent enough to include fruit juice based drinks and it is clear that fruit juice based drinks are subsumed in Item No.5 of Entry 71 after its amendment. We have already observed that items which have been grouped under Section 6(1)(a) are all those items where higher tax slab has been fixed looking into the nature of the goods.It is well settled that all tobacco based goods which are now included in Item No.6(1)(a) are dangerous to health, the use of the plastic, polythene etc. which have also adverse effect on the health and environment. In contrast to 'aerated branded soft drinks'which are included in Section 6(1)(a), health drinks of all varieties are included in Entry 71 as amended. Aerated branded soft drinks which are referred to in Section 6(1)(a) cannot be drinks which are health drinks. Fruit juice based drinks can be regarded as health drinks as compared to other aerated branded soft drinks

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like pepsi cola, coka cola, etc.We are, thus, of the opinion that the appellant has successfully proved by relevant scientific and technical materials that the product in question that is 'Appy Fizz' is a commodity which is fully covered by Item No.5 of Entry 71 as amended by S.R.O. No.119 of 2008. The High Court discarded scientific and expert opinion with regard to manufacturing process and contents of the product. The orders of Food Safety Authority were also discarded which were relevant for considering the nature and contents of product. The adjudication by CESTAT was relevant at least on the aspect that the 'Appy Fizz'is not aerated which was also discarded by the High Court as well as by the Committee of the Commissioners. In view of the aforesaid discussion, we are of the considered opinion that the appellant has successfully proved from the materials brought on the record that the product 'Appy Fizz'was required to be classified under Item No.5 of the Entry 71 as amended with tax liability at 12.5% after amendment by S.R.O. No.119 of 2008 (now at the rate of 14.5%).

64. Now, coming to the appeal arising out of SLP(C)No.9467 of 2016. The appeal has been filed by the Revenue challenging the judgment of learned Single Judge and Division Bench by which direction was issued to the Committee of the Commissioners to decide the application filed by the appellant under Section 94 of Act, 2003.Learned Single Judge has issued directions dated 31st August, 2015 directing the Commissioner of Commercial Taxes to pass orders on the clarification application.The appellant was also given liberty to produce all material, on which the appellants intend to place reliance to substantiate their contention with regard to the classification of the product in question.In writ petition filed by the Revenue before the Division Bench, the Division Bench affirmed the order and while referring to subsection (4) of Section 94 stated following:

> *"Subsection(4) of Section 94 states that where any question arises from any order already passed or any proceedings recorded under the KVAT Act, or any earlier law, no such question shall be entertained for determination under Sub section (1). Insofar as the issue raised by the respondent through the application before the authority is concerned, there is no order that has already been passed or there is no proceedings recorded as against it which could be treated as a final one. All what has been done is the issuance of notice as noted above as a proposal in relation to the assessment proceedings. The socalled revisional order passed by this Court in yet another case would not also have the efficacy of depleting the jurisdiction of the authority under Section 94 of the KVAT Act to issue clarification. The very purpose of the provision in the form of Section 94 and clothing authority with power to make different nature of considerations to conclude such issues, necessarily, show that no revisional order of this Court in an earlier proceedings could conclude the issues which could be considered in an application for clarification by the competent authority under Section 94 of the KVAT Act."*

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65. The Division Bench did not commit any error in dismissing the appeal and observing that no revisional order of this Court in an earlier proceedings could conclude the issues which could be considered in an application for clarification by the competent authority under Section 94 of Act, 2003. We do not find any error in the judgment of the learned Single Judge as well as of Division Bench and this appeal deserves to be dismissed.

66. Now coming to Civil Appeals arising out of SLP(C)Nos.2446061 of 2016.These appeals have been filed by the assessee against an order of learned Single Judge by which order the learned Single Judge disposed of the writ petition by following orders:

> *"Accordingly, these writ petitions are disposed of in the following manner:*
>
> *(i) The demand made in the above cases shall remain stayed till disposal of the appeals, on condition of the petitioners depositing 50% of the amount involved.*
>
> *(ii) The petitioners are granted four weeks time to remit the amount.*
>
> *(iii)The Appellate Authority shall endeavour to dispose of the appeal as expeditiously as possible."*

67. The learned Single Judge has noted about the pendency of SLP(C)Nos.1469798/2016 in this Court where classification of the product was under challenge. By this judgment we are also disposing of the Civil Appeals arising out of SLP(C)Nos.1469714698 of 2016. Further proceedings in case of the assessee that is M/s.We Six Traders Etc.Etc. has to be, thus, concluded in accordance with our decision in Civil Appeals arising out of SLP(C)Nos.1469714698 of 2016. Any amount deposited in pursuance of the interim order of the High Court dated 14th July, 2016 shall abide by the consequential orders to be passed in the proceedings against the assessee.We, thus, do not find it necessary to interfere with the order dated 14th July, 2016 of the learned Single Judge and the Civil Appeals are disposed of with direction that in proceedings against the assessee consequential orders shall be passed including an adjustment of the amount deposited, if necessary, as per our judgment in Civil Appeals arising out SLP(C)Nos.1469714698 of 2016.

<u>In the result</u>

(1) Civil Appeals arising out of SLP(C)Nos.1469714698 of 2016 are allowed, judgment of the Division Bench as well as order passed in the Review Application are set aside.OT Appeal filed by the appellant is allowed and the order passed by the Committee of Joint Commissioners dated 06.11.2015 is set aside. It is declared that product of the appellant 'Appy Fizz' is required to be classified as under Item No.5 of Entry 71 as amended by S.R.O.No.119 of 2008.

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(2) Civil Appeal arising out of SLP(C)No.9467 of 2016 is dismissed.

(3) Civil Appeals arising out of SLP(C)Nos.2446061 of 2016 are disposed of directing the proceedings against the assessee be decided in the light of our judgment in Civil Appeals arising out of SLP(C)Nos.1469714698 of 2016 and necessary consequential orders be passed accordingly.

..........................J.
(A.K. SIKRI)

..........................J.
(ASHOK BHUSHAN)

NEW DELHI,
MAY 09, 2017.

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ITEM NO.1D COURT NO.7 SECTION III
(For judgment)

S U P R E M E C O U R T O F I N D I A
RECORD OF PROCEEDINGS

Civil Appeal Nos.6468-6469 of 2017
(Arising out of SLP (C) Nos. 14697-14698 of 2016)

M/S. PARLE AGRO (P) LTD. ... Appellant(s)

VERSUS

COMMISSIONER OF COMMERCIAL TAXES, TRIVANDRUM ... Respondent(s)

WITH

Civil Appeal Nos.6471-6472 of 2017
(Arising out of SLP(C) No. 24460-24461 of 2016)

Civil Appeal No.6470 of 2017
(Arising out of SLP(C) No. 9467 of 2016)

Date : 09/05/2017 These matters were called on for hearing today.

For Petitioner(s) Mr. Aditya Bhattacharya, Adv.
Mr. Victor Das, Adv.
Mr. M. P. Devanath, Adv.
Ms. L. Charanya, Adv.

Mr. Ramesh Babu M. R., Adv.

For Respondent(s) Mr. G. Prakash, Adv.
Mr. Jishnu M. L., Adv.
Ms. Priyanka Prakash, Adv.
Ms. Beena Prakash, Adv.
Mr. Manu Srinath, Adv.

Mr. Rajesh Kumar, Adv.

Hon'ble Mr. Justice Ashok Bhushan pronounced the

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judgment of the Bench comprising Hon'ble Mr. Justice A.K.Sikri and His Lordship.

Leave granted.

Civil Appeals arising out of SLP (C)Nos. 14697-14698 of 2016 are allowed, Civil Appeal arising out of SLP (C)No. 9467 of 2016 is dismissed and Civil Appeals arising out of SLP (C)Nos. 24460-61 of 2016 are disposed of in terms of the signed reportable judgment.

(Nidhi Ahuja) Court Master	(Mala Kumari Sharma) Court Master

[Signed reportable judgment is placed on the file.]

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