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2023:BHC-AS:37052-DB

IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CIVIL APPELLATE JURISDICTION

WRIT PETITION NO. 12775 OF 2019

Nutan Warehousing Company Pvt. Ltd. .. Petitioner

Versus

1. The Commissioner, Central Tax, Pune-II
2. The Commissioner, State Tax.
3. The Union of India
4. The State of Maharashtra
5. The Maharashtra Authority for Advance Ruling.
6. The Maharashtra Appellate Authority for Advance Ruling. .. Respondents

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Mr.Shriram Sridharan with Mr.Shanmuga Dev, for the Petitioner.
Mr.Karan Adik with Ms.Maya Majumdar, for Respondent Nos.1 and 3.
Ms.Shruti D. Vyas, 'B' Panel Counsel for State/ Respondent Nos.2, 4 & 6.

CORAM : G. S. KULKARNI & JITENDRA JAIN, JJ.

DATED: 11 December, 2023

JUDGMENT (Per: G. S. Kulkarni, J.):-

1. Rule, made returnable forthwith. Respondents waive service. By consent of parties, heard finally.

2. This petition under Article 226 of the Constitution of India challenges an order dated 10 December 2018 passed by the 'Maharashtra

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Appellate Authority for Advance Ruling for Goods and Services Tax' constituted under Section 99 of the Maharashtra Goods and Services Act,2017, whereby the petitioners appeal filed under Section 100 of the Central Goods and Services Tax Act,2017 and the Maharashtra Goods and Services Tax Act (for short '**CGST Act**' and '**MGST Act**' respectively), on the issue whether the petitioner would be entitled to an exemption under Notification No. 12 of 2017 dated 28 June, 2013, so as to be exempted from payment of service tax under Sr.No.54(e) of the said notification pertaining to loading, unloading, packing, storage or warehousing of "agricultural produce" namely "tea" has been rejected.

3. The petitioner's case as set out in the petition is as follows:

The petitioner is a company incorporated under the Companies Act, 1956. The petitioner was *inter alia* formed to carry out the business of warehousing, cold storage and refrigeration in all its branches, activities and spheres. It provides godown and warehousing facilities to the distributors of agriculture and allied products. The petitioner also has licence for carrying on business of warehousing under the Bombay Warehouses Act, 1959. The petitioner has constructed warehouses at various places, one of the warehouse constructed by the petitioner is at Fursungi, Pune, in respect of which application for advance ruling in

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question came to be made by the petitioner. It has obtained a registration under the CGST and MGST Act.

4. The petitioner had let out its warehouse to M/s. Unilever India Exports Ltd. (for short '**Unilever**') on payment of compensation as per the provisions of the Bombay Warehouses Act, 1959.

5. The petitioner has contended that Unilever procured in bulk 'tea' of various qualities either from public tea auctions or directly from manufacturers of tea in 50 kg bags and stored them in the petitioner's warehouse. It is contended that such procured tea leaves normally underwent standard processes prior to its procurement. The processes as described by the petitioner, are as under:-

> "Tea leaves are plucked from the tea plants and the green leaves, plucked from the plants are not fit for the human consumption, it cannot be sold in the open market for human consumption. The raw tea leaves are withered by exposure in the shadow of the sun or by heating in trays until pliable. Thereafter the leaves are rolled by hand or machine in order to break the leaf cells and liberate the juices and enzymes. Finally, the leaves are completely dried either by further exposure to the sun, over fires, or in a current of hot air and then the tea leaves are fermented in baskets, glasses and in clothes. Thereafter the leaves were subjected to grading with sieves of various sizes. The said leaves are finally roasted with charcoal for obtaining suitable flavour and colour. Thereafter the said tea is packed in the bulk packs.
>
> The processing of the tea makes it marketable by minimal process and they are made fit for human consumption. All the above processes are necessary for the purpose of saving the tea leaves from perishing. In case the above process is not carried out immediately, the entire tea leaves would be perished. The process, as indicated above, at no point of time, crossed that limit and robbed the tea leaves

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of their character of being and continuing as such substantially.”

The process undertaken on green leaves consists of only above processes and not beyond them.”

6. The procurement of such tea is stated to be undertaken during the season. As per the orders as may be received, Unilever would undertake blending and packing of the tea, at the petitioner’s warehouse. After the tea is packed, it is exported to overseas countries. The petitioner being of the strong view that the tea, procured in bulk, either from public tea auctions or directly from manufacturers of tea, was an agricultural produce as defined in clause 2(d) of the Notification No. 12/2017-CT (Rate) dated 28 June, 2017 (for short ‘**the 2017 Notification**’), for the reason, that the tea was not losing its essential characteristics.

7. The petitioner in its application made to the Authority for Advance Ruling (for short “**AAR**”), claimed that the storage and warehousing of tea was exempted vide Serial No. 54(e) of Notification No.12/2017-Central Tax (Rate). The said entry is required to be noted which reads thus:-

54	Heading 9986	Services relating to cultivation of plants and rearing of all life forms of animals, except the rearing of horses, for food, fibre, fuel, raw material or other similar products or agricultural produce by way of- (a) agricultural operations directly related to production of	Nil	Nil

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		any agricultural produce including cultivation, harvesting, threshing, plant protection or testing; (b) supply of farm labour; (c) processes carried out at an agricultural farm including tending, pruning, cutting, harvesting, drying, cleaning, trimming, sun drying, fumigating, curing, sorting, grading, cooling or bulk packaging and such like operations which do not alter the essential characteristics of agricultural produce but make it only marketable for the primary market; (d) renting or leasing of agro machinery or vacant land with or without a structure incidental to its use; (e) **loading, unloading, packing, storage or warehousing of agricultural produce;** **(f) agricultural extension services;** **(g) services by any Agricultural Produce Marketing Committee or Board or services provided by a commission agent for sale or purchase of agricultural produce.**		

(emphasis supplied)

8. The petitioner considering that the tea as an agricultural produce, falling within the definition as contained in Notification No.12/2017-Central Tax (Rate) dated 28 June 2017, approached the AAR by an application dated 16 January 2018 raising the following issue:

> "Whether the supply of warehouse services used for packing and storage of Tea, in the facts and circumstances, was exempted vide

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> Sr.No.54 to Notification No. 12 / 2017-Central Tax (Rate) or otherwise?"

9. Before the AAR, the petitioner contended that Unilever to whom the warehouse of the petitioner was licensed, was procuring tea of various quality in bulk either from public tea auctions or directly from manufacturers of tea and was undertaking blending and packing of the same at the petitioner's warehouse. It was contended that after packing, tea was exported to overseas countries. It was contended that the petitioner was of the firm view that the tea procured in bulk, either from public tea auctions or directly from manufacturers of tea, was an agricultural produce as defined in clause 2(d) of the Notification No.12/2017-CT(Rate) dated 28 June 2017. It was contended that storage and warehousing of tea post procurement, blending and packing undertaken by Unilever was thus exempted under Entry No.54(e) of the 2017 Notification. It was next contended that based on such understanding the petitioner had neither taken GST registration nor discharged the GST liabilities, however, at the instance of Unilever, the petitioner had taken registration and was regularly discharging GST liability.

10. The AAR considering the definition of agricultural produce as defined in the 2017 Notification as also considering the relevant entry

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being Sr.No.54 Heading 9986 and on considering the nature of such goods (tea) stored at the petitioner's warehouse as received from Unilever, in the impugned order, has observed thus:-

> "From the perusal of above activities provided by M/s, Unilever including photographs of manufacturing process as above as well as photographs of manufactured goods being stored by them, it is crystal clear that even if we assume that in the beginning they are bringing raw tea leaves or may be semi processed tea leaves which they have not clearly specified to the godown, they are under taking further processing and manufacturing of the same as per processes given above and are finally storing manufactured tea as per details given by them self above which finally culminates into packing of Lipton Pure and Simple 100s tea bags. This activity of M/s. Unilever of processing of raw tea leaves into tea results in emergence of a new product having distinct name i.e., Tea, which has distinct name, character and use i.e. Lipton Pure and Simple 100s Tea bags. As such the impugned activity is a 'manufacture' as defined in clause (72) of section 2 of the GST Act. The final product considering various processes undertaken by M/s. Unilever cannot be considered as Agricultural Produce."

11. Accordingly, the AAR answered the question as posed by the petitioner in the negative and against the petitioner, by its order dated 23 May 2018.

12. Being aggrieved by the order passed by the AAR, the petitioner approached the Appellate Authority for Advance Ruling (for short '**AAAR**') in an appeal filed under Section 101 of the CGST Act / MGST Act, 2017. The AAAR by the impugned order has dismissed the

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petitioner's appeal and accordingly, the proceedings are before us.

13. A reply affidavit has been filed on behalf of respondents nos. 1 and 3 not disputing that the warehousing business of the petitioner, and the petitioner dealing in agricultural and allied products. It is also not disputed that the licence was granted to the petitioner for carrying out business of warehousing under Bombay Warehousing Act, 1959 and that the petitioner had rented the warehouse to M/s. Unilever India Exports Ltd. Insofar as the petitioner's case, that the petitioner, in dealing with the storage of tea, was exempted from payment of tax, and that the processing of tea has made the tea marketable by minimal process, so as to make the tea fit for human consumption as asserted by the petitioner, is not the correct position, as such processes were not "minimal" processes, which are usually undertaken by a cultivator or producer on an agricultural produce. It is contended that these are the processes which require well established plant and machinery to undertake the same and hence such operations were correctly taken as manufacturing process. For such reason, the agricultural produce after undergoing these processes was required to be treated as processed goods. It is contended that the question as raised by the petitioner in fact has already been addressed by CBIC Circular dated 15 November, 2017 (No. 16/16/2017-GST) and hence the processed tea

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does not qualify to be defined as "Agricultural Produce". It is contended that the AAR's observation that the stored goods in the present case, i.e., tea was a non-agricultural produce cannot be faulted. The affidavit has laid emphasis on the activities of Unilever in regard to processing of the tea so as to contend that it is not an agricultural produce.

14. It is next contended that the parameters which become applicable to an agriculturist cannot become applicable to tea as stored in the petitioner's warehouse by Unilever, and for such reason the petitioner's case, that there is no change in the essential characteristics of agricultural produce is not acceptable. It is next contended that as per the "Negative list of Services" under Section 66D of the Finance Act, 1994 and sub-section (d)(iv) of the said provision, "Renting or leasing of agro machinery or vacant land with or without a structure incidental to its use" and further, as per sub-section (d)(v) of the said provision, "loading, unloading, packing, storage or warehousing or agricultural produce" were exempted. However, the services rendered by the petitioner in the present case do not qualify to be defined as "Services provided for storage/warehousing of agricultural produce". It is thus submitted that the impugned activity of processing of tea and consequent storage would fall within the definition of "manufacture" as defined in Clause (72) of Section 2 of GST Act, which

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disqualifies the goods being stored to be the Agricultural Produce. For these reasons, it is submitted that the petition be dismissed.

Petitioner's Submissions

15. Mr. Sriram Sridharan, learned Counsel for the petitioner in assailing the findings of both the authorities rendered against the petitioner has made the following submissions:

16. The first contention as raised by Mr.Sridharan is that the impugned order is contrary to law as laid down by the Supreme Court in **Commissioner of Sales Tax, Lucknow vs. D. S. Bist and Sons, Nainital**[1], inasmuch as the AAR ought to have held that tea is an agricultural produce, hence for the purpose of exemption from payment of service tax, it ought to have been held to be covered under the heading 9986 Sr. No.54 as contained in the said 2017 Notification. It is submitted that all of the activities / processes which were undertaken to the tea stored in the petitioner's warehouse did not alter its essential characteristics so as to make it marketable for primary market. It is submitted that for such reasons, the tea stored in the petitioner's warehouse was clearly "agricultural produce", hence, for the purpose of service of warehousing, it was exempted from the levy of GST under the said notification. It is

1 (1979) 4 SCC 741

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submitted that the processes which were undertaken on the tea after Unilever procured the tea, namely, the activities of blending / mixing in specific proportions, packaging for the purpose of export as and when an order was received, which is 7 – 10 days prior to export of such consignment, all such activities would not change the character of the tea of being an agricultural produce. It is submitted that every kind of agricultural produce would undergo some kind of treatment in its form in order to bring them to the condition, of making such produce non perishable, and/or to make it either transportable or marketable. This would apply to tea leaves, which are not marketable in the market afresh from the tea gardens and are subjected to minimal processes necessary to save the tea leaves from perishing and to make them fit for transporting and marketing. It is submitted that this is well acceptable principle as laid down by the Supreme Court in the case of **D. S. Bist and Sons** (supra). It is submitted that even if such processes are undertaken by Unilever, it would not make any material difference, as the tea would retain its character as an agricultural produce as held by the Supreme Court in **D. S. Bist and Sons** (supra).

17. It is next submitted that the decision of the Supreme Court in

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Union of India Vs. Belgachi Tea Company[2] as applied by the AAAR in rejecting the petitioner's appeal, is not an authority on the proposition the petitioners canvassed before the AAAR, much less to reject the petitioner's contention. This for the reason that in such case, the issue was of taxability of the agricultural income, and as to whether the tea leaves which had undergone process as withering, rolling, drying, fermenting, sieving and roasting to make it suitable for the primary market was an 'agricultural produce', was not the issue before the Supreme Court. It is next submitted that the findings as rendered by the AAAR that the activities of Unilever amounted to manufacture is also not correct, as it was never the test in the present facts. It is submitted that even if tea is subjected to an activity which amounts to 'manufacture' as long as such activity is done, as is usually done by a cultivator or producer, which does not alter its essential characteristics, but makes it marketable for primary market, it would still continue to be an 'agricultural produce' as defined in Clause 2(d) of the 2017 notification. It is submitted that this is a fit case where this Court needs to allow the petition by issuing a writ of certiorari considering the well settled principles of law as laid down by the Supreme Court in **Hari Vishnu Kamath vs. Syed Ahmad Ishaque & Ors.**[3], and **Hindustan Steels**

2 (2008) 304 ITR 1 (SC)
3 (1955)1 SCR 1104

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Ltd., Rourkela VS. A.K.Roy & Ors.[4], for the reason that there is an error of law, manifest on the face of the record in both the authorities, passing an order which would be contrary to law. It is, therefore, submitted that the impugned order be set aside and the petition be allowed.

Submissions of the Revenue

18. On the other hand, Mr.Adik, learned Counsel for the Revenue has supported the impugned orders. It is submitted that as rightly held by the authorities below, the tea as stored in the petitioner's warehouse did not fall within the definition of 'agricultural produce' as defined in Clause 2(d) of the 2017 Notification, for the reason that in the godown itself the tea undergoes a further processing, namely, by the process of blending, etc. as pointed out by the petitioner, hence, the final product namely tea which is sought to be exported cannot be called as agricultural produce for the purpose of any exemption under the 2017 notification. Mr.Adik has taken us through the orders passed by the AAR as also the appellate authority – AAAR in support of his contention, to contend that within the limited jurisdiction of this Court in issuing a writ of certiorari, the findings which are borne by the record ought not to be interfered. In support of his contention Mr.Adik has placed reliance on the decision of the Division

4 1969(3) SCC 513.

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Bench of this Court in **Jotun India Pvt. Ltd. Vs. the Union of India & Ors.**[5]

Analysis and Conclusion:-

19. We have heard learned Counsel for the parties, we have also perused the record. As seen from the record, the issue which had fallen for consideration of the AAR was 'whether the petitioner would be entitled to exemption in supply of warehouse services as let out to Unilever for packing and storage of tea under the Item Sr. No.54(3) of the 2017 Notification'.

20. To consider as to whether in the facts and circumstances of the case, the view taken by the AAR and as confirmed by the AAAR would stand the test of law in categorizing tea as stored in the petitioner's warehouse as a manufactured product, it is crucial that the facts in regard to processing of the Tea and which appears to be not in dispute, are carefully examined. The petitioner's warehouse was let out to Unilever India Export Ltd. as permissible under the Bombay Warehouse Act. Before the AAR the petitioner went with a case that Unilever was procuring tea of different variety/qualities in bulk either from public tea auctions or directly from manufacturers of tea and was undertaking blending and packing of the

5 Writ Petition No.12691 of 2019, Order dt. 22.12.2022.

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same at the petitioner's warehouse and after packing of the tea, it was exported overseas to different countries. The petitioner was of the considered view that the tea procured in bulk by Unilever either from public tea auctions or directly from manufacturers of tea, was an 'agricultural produce' as defined under Clause 2(d) of the 2017 Notification being the subject matter of storage and warehousing. The petitioner was also of the firm view that post such procurement, the tea continued to possess its trail as an 'agricultural produce' and was exempted under Entry No.54 of the said 2017 Notification, despite the activities of blending and packing as undertaken. The petitioner contended that based on this understanding, the petitioner initially had not taken GST registration nor had it discharged GST liability. However, at the instance of the Unilever, the petitioner had obtained a registration and/or was regularly discharging its GST obligation. It is on such serious reservation on taxability of renting of its warehouse services for the purpose of storing of tea/agricultural produce, the petitioner had approached the AAR, by invoking the provisions of Section 98 of the CGST Act / MGST Act.

21. To consider the issue, at the outset, it would be necessary to note the definition of 'agricultural produce' as defined under Section 2(d) of the 2017 Notification which reads thus:-

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> "agricultural produce" means any produce out of cultivation of plants and rearing of all life forms of animals, except the rearing of horses, for food, fibre, fuel, raw material or other similar products, on which either no further processing is done or such processing is done as is usually done by a cultivator or producer which does not alter its essential characteristics but makes it marketable for primary market;"

22. The exemption in regard to the agricultural produce is provided under Sr. No.54(e) of the 2017 Notification which reads thus:-

54	Heading 9986	Services relating to cultivation of plants and rearing of all life forms of animals, except the rearing of horses, for food, fibre, fuel, raw material or other similar products or agricultural produce by way of- (a) … ….; (b) … ….; (c) … … ..; (d) … … ..; (e) **<u>loading, unloading, packing, storage or warehousing of agricultural produce;</u>**	Nil	Nil

(emphasis supplied)

23. On a plain reading of the definition of the 'agricultural produce' and as applicable in the present context, it can be certainly inferred that the tea is produced from the cultivation of plants (tea gardens). It is an edible produce meant for human consumption. It can also be said that tea without processing, which can be done either by the cultivator / producer, or otherwise cannot be consumed. Further such processes do not alter its

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essential characteristic of tea ceasing to be an agricultural produce. Also such processing is necessary for making tea marketable for primary market. Merely by blending i.e. mixing or combining different teas and/or packing, such processes would not change the basic character of tea as an 'agricultural produce'. Again by undertaking packing, it cannot be countenanced that the essential characteristic of tea to be an agricultural produce would undergo any change. It is ill-conceivable that the packs of tea cannot be sold in marketable lots, acceptable packages for its marketing.

24. The petitioner in supporting its case that the tea would be an agricultural produce even after processing etc, would be correct in placing reliance on the decision of the Supreme Court in **D. S. Bist and Sons** (supra), wherein the Supreme Court in the context of determining a dispute under the U. P. Sales Tax Act, 1948 had the occasion to consider whether tea was an agriculture produce. In such case, the respondent / assessee owned tea gardens and sold tea leaves after the tea leaves were plucked from tea shrubs and undergoing various processes like withering, crushing and roasting etc. The assessee had contended that the tea leaves sold by it, was 'agricultural produce' and therefore, was not exigible to sales tax in view of the proviso to Section 2(i) of the U.P. Sales Tax Act . The

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asessee’s contention being not accepted by the revenue, in a reference, the High Court having found favour the revenue’s contention, the proceedings reached the Supreme Court. The High Court had examined the question ‘whether on the facts and circumstances of the case, the article ceased to be an agricultural produce and whether tea produced by the assessee was exigible to the sales tax?’. In such context, Section 3 being the charging section under which it was the turn-over for each assessment year that determined the tax, the Supreme Court considered the definition of 'turnover' as defined under section 2(i) of the Act alongwith its proviso as it stood at the relevant time. In this context, the Supreme Court observed that the assessee had made ‘tea marketable’ and fit for consumption by the consumers and then sold it, and if the tea – leaves so sold substantially retained the character of being an agricultural produce, it is plain that the assessee’s sales will not be exigible to sales-tax. The relevant observations as made by the Supreme Court in such context are required to be noted which read thus:-

> *6. The question for consideration is whether on the findings aforesaid it can be justifiably held in law that the leaves lost their character of being an agricultural produce and became something different. It should be remembered that almost every kind of agricultural produce has to undergo some kind of processing or treatment by the agriculturist himself in his farm or elsewhere in order to bring them to a condition of non-perishability and to make them transportable and marketable. Some minimal process is necessary to be applied to many varieties of agricultural produce. As*

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for example, when wheat stalks are cut from the farm, threshing and winnowing have to be done. The product so obtained has to be dried for a few days. The husk and dust have to be separated. Thereafter packing the wheat in bags or other containers it is taken to the markets for sale. One can never suggest that such a wheat product becomes a commodity different from the one which was produced in the process of agriculture. To pursue that example further, if the agriculturist who produces the wheat has a flour mill and crushes the wheat produced by him in that mill and then if the flour so produced is sold by him one can never reasonably suggest that the flour sold by him is an agricultural produce, because in that event, the manufacturing process goes beyond the limit of making the agricultural produce fit for marketing as such and turns it into a different commodity altogether i.e. flour. But there may be some other kinds of agricultural produce which required some more processing to make it marketable. In the case of such a commodity what one has to judge is to find out whether in relation to that agricultural produce the process applied was minimal or was it so cumbersome and long drawn that either in common parlance, or in the market, or even otherwise, any body would not treat the produce as an agricultural produce. The mere fact that in the case of a particular product the process is a bit longer or even a bit complicated will not rob the produce of its character of being an agricultural produce. Largely the inference to be drawn from the primary facts of processing, one may say, will be an inference of fact. But it is not wholly so. In a given case it will be a mixed question of fact and law. If wrong tests are applied in drawing the inference that the agricultural produce has lost its character of being so, then it will be a question of law and the High Court will have jurisdiction in an appropriate reference, as in the present case it had, to decide whether the case came under the proviso to section 2(i) of the Act.

7. Unlike many agricultural products tea-leaves are not marketable in the market fresh from the tea gardens. No body eats tea-leaves. It is meant to be boiled for extracting juice out of it to make tea liquor. Tea-leaves are, therefore, only fit for marketing when by a minimal process they are made fit for human consumption. Of course, the processing may stop at a particular point in order to produce inferior quality of tea and a bit more may be necessary to be done in order to make it a bit superior. But that by itself will not substantially change the character of the tea-leaves, still they will be known as tea-leaves and sold as such in the market. In my opinion all the six processes enumerated above from the primary findings of fact recorded in the order of the Revising Authority were necessary for the purpose of saving the tea-leaves from perishing, making them fit for transporting and marketing them. The process applied was minimal. Withering, crushing and roasting the tea-leaves will be surely

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necessary for preserving them. The process of fermentation or final roasting with charcoal for obtaining suitable flavour or colour and also the process of grading them with seives were all within the region of minimal process and at no point of time it crossed that limit and robbed the tea-leaves, the agricultural produce, of their character of being and continuing as such substantially. In my opinion, therefore, the view expressed by the High Court is quite justified and sustainable in law.

8. In Volume 21 of Encyclopaedia Britannica (1968 edition) under the head 'Tea' are dealt with at page 739 the processes of cultivation and manufacture of tea. Under the sub-head 'Cultivation' it is found stated:-

> *"Tea leaves are plucked either by hand or with special shears. In the tropical areas of southern India, Ceylon, and Indonesia, harvest continues throughout the year, but in the subtropical regions of northern India and China and in Japan and Formosa, the harvests are seasonal. The flavour and quality of the tea-leaves vary with the climate, soil, age of the leaf, time of harvest (even from season to season), and method of preparation."*

Then comes the sub-head 'Manufacture' which enumerates the categories of three classes of teas and then it is mentioned:-

> *"Most stages of processing are generally common to the three types, of tea. First, the fresh leaves, are withered by exposure to the sun or by heating in trays until pliable (usually 18-24 hours). Next the leaves are rolled by hand or machine in order to break the leaf cells and liberate the juices and enzymes. This rolling process may last up to three hours. Finally, the leaves are completely dried either by further exposure to the sun, over fires, or in a current of hot air, usually for 30- 40 minutes."*

In making black tea, the leaves, after being rolled, are fermented in baskets or on glass shelves or cement floors under damp cloths. "The process of fermentation, or oxidation, reduces the astringency of the leaf and changes its colour and flavour." About green-leaves it is mentioned- "Green tea is made by steaming without fermentation in a perforated cylinder or boiler, thus retaining some of the green colour. The leaves are lightly rolled before drying." It would thus be seen that the tea-leaves as plucked have got to pass through stages of processing of one kind or the other in order to make them fit for human consumption, as in the case of paddy and many other commodities dehusking in the case of former and some other kind of

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process in regard to the latter has got to be done in order to make them marketable and fit for consumption.

9. …..

10. There are two decisions of the Bombay High Court given in relation to the question of sugarcane being converted into jaggery. They are:-R. B. N. S. Borawake v. The State of Bombay, (1960) 11 STC 8 (Bom HC) and Commissioner of Income-Tax, Poona v. H.G. Date., (1971) 82 ITR 71 (Bom HC). In the former case it was observed at page 11:-

> *"It is true that gur cannot be regarded as an agricultural produce grown on land. But if gur is prepared out of the agricultural produce which is grown on land, in the absence of any indication to the contrary suggesting that the agricultural produce must be sold in the form in which it is grown, we will be justified in holding that an agriculturist who is exclusively selling agricultural produce grown on the land either in the form in which it is grown or in the form in which it is converted for the purpose of transportation or preventing deterioration is within the exception provided by section 2(6). In the present case, with a view to prevent deterioration and for the purpose of facilitating transportation the assessee converted the sugar-cane grown by him into gur and sold it."*

It appears to me that this case has gone a bit too far and on an appropriate occasion it may require further consideration. Nonetheless, in the instant case one can safely conclude, as I have done, that with a view to prevent deterioration and for the purpose of facilitating transport and making it marketable the assessee himself did some processing to the plucked tea-leaves and hence the High Court was right in holding that such sales were not exigible to sales-tax. Similar or identical principles have been applied by other High Courts also in respect of different commodities such as rubber, sole crepe, casuarina, pig bristles etc. The cases are-Deputy Commissioner of Agricultural Income-Tax and Sales-Tax, South Zone v. Sherneilly Rubber & Cardamom Estates Ltd. & Others, Deputy Commissioner of Agricultural Income-Tax and Sales- Tax, Quilon v. Travancore Rubber and Tea Co., Ltd.; Commissioner of Income-Tax v. Woodland Estates Ltd.; Rayavarapu Mrityanjaya Rao v. The State of Andhra Pradesh and Commissioner of Sales Tax, U.P., Lucknow v. Harbilas Rai and Sons. Broadly speaking these cases have been decided on application of the correct principles of law.

11. Reliance on behalf of the Revenue was placed upon a few cases. None of them supports the department's contention. I may notice only two or three of them. In Killing Valley Tea Company, Ltd. v. Secretary to State, the question for consideration related to the tax

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liability of the Killing Valley Tea Company under the Income Tax Act, 1918. If the whole of its income was derived from agriculture, the assessee was not liable to pay income-tax. If, however, the activities of the Company, which produced income were attributable partly to agriculture and partly to its manufacturing activities, then the whole of the amount could not have been taxed under the Income-Tax Act. The stand of the Company was-"the actual leaf of the tea plant, without the addition thereto of the processes above described, is of no value as a market commodity." On behalf of the Revenue it was contended "that the manufacturing processes carried out in a modern tea factory, with scientific appliances and up- to-date machinery, are different from those ordinarily employed by a cultivator to render the produce raised by him fit to be taken to market." The High Court held-

> *"that the process in its entirety cannot be appropriately described as agriculture. The earlier part of the operation when the tea bush is planted and the young green leaf is selected and plucked may well be deemed to be agriculture. But the latter part of the process is really manufacture of tea, and cannot, without violence to language, be described as agriculture….. The green leaf is not marketable commodity for immediate use as an article of food, but it is a marketable commodity to be manufactured by people who possess the requisite machinery into tea fit for human consumption."*

After referring to some authoritative books on Tea, the view expressed by the High Court was "that the entire process is a combination of agriculture and manufacture." Hence only a part of the income was held to be taxable. In the instant case the problem is quite distinct and different. Here we are concerned with the question whether the commodity which the assessee sold as tea was his agricultural produce or not. He had not sold his tea-leaves from his gardens to any manufacturing tea company. He had himself applied some indigenous and crude manufacturing process in order to enable him to sell his tea in the market. In such a situation I have no difficulty in holding that the sale was of his agricultural produce.

12. …

13 ….

14. ….

15. ….<u>The question before us is whether after the tea leaf had been put through the process of withering, crushing, roasting and fermentation it continued to be agricultural produce. If the Calcutta High Court can be said to have laid down that as a result of those processes the tea leaf ceased to be agricultural produce, I am unable to agree with it. To my mind, the tea leaf remained what it always was. It</u>

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> *was tea leaf when selected and plucked. and it continued to be tea leaf when after the process of withering, crushing and roasting it was sold in the market. The process applied was intended to bring out its potential qualities of flavour and colour. The potential inhered in the tea leaf from the outset when still a leaf on the tea bush. The potential surfaced in the tea leaf when the mechanical processes of withering, crushing and roasting, fermenting by covering with wet sheets and roasting again were applied. The tea leaf was made fit for human consumption by subjecting it to those processes. At no stage. did it change its essential substance. It remained a tea leaf throughout. In its basic nature, it continued to be agricultural produce."*
>
> (emphasis supplied)

25. In the case of **Belsund Sugar Co. Ltd. vs. The State of Bihar & Ors.**[6], the Constitution Bench of the Supreme Court *interalia* examined the provisions of Section 2(1)(a) of the Bihar Agricultural Produce Markets Act, defining the word "agricultural produce". The said provision as considered by the Supreme Court reads thus:-

> "Section 2(1)(a) of the Act defines 'agricultural produce' as under :
> "Agricultural produce' means all produce whether processed or non-processed, manufactured or not, of Agriculture, Horticulture, Plantation, Animal Husbandry, Forest, Sericulture, Pisciculture, and includes livestock or poultry as specified in the Schedule."

In the context of such definition, the Supreme Court observed that it cannot be said that "tea leaves" produced from the tea gardens being primary agricultural produce, would cease to be agricultural produce once they got processed. The Court observed that after plucked tea leaves are processed by roasting them and then by subjecting them to further process of blending and ultimately packing them in suitable packets, they still

6 AIR 1999 Supreme Court 3125

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remained all the same agricultural produce, so manufactured out of the basic agricultural raw material 'tea leaves'. The relevant observations read thus:-

> "145. ….. Section 2(1)(a) of the Market Act, as seen earlier, includes in the definition of agricultural produce not only the primary produce grown in the field but also covers all processed or non-processed, manufactured or non-manufactured agricultural produce as specified in the Schedule. In the light of the aforesaid wide sweep of this definition, it cannot be said that tea leaves which are produced in tea gardens being primary agricultural produce would cease to be agricultural produce once they got processed. After plucked tea leaves are processed by roasting them and then by subjecting them to further process of blending and ultimately packing them in suitable packets they still remain all the same agricultural produce so manufactured out of the basic agricultural raw material "tea leaves". ….…"

26. In our opinion, the law laid down by the Supreme Court in **D. S. Bist and Sons** (supra) and **Belsund Sugar Co. Ltd (supra)** is clearly applicable in the facts of the present case, which ought to have persuaded the AAR to hold that the tea belonging to Unilever as stored in the petitioner's godown, did not change its essential characteristics merely because certain processes were undertaken, so as to reach to a conclusion that tea was an agricultural produce. In reaching the above conclusion as to what was understood by the term 'agricultural produce' in some enactments and how they were considered by the Court can be discussed.

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27. In **CIT vs. Cynamide**[7], the Supreme Court had an occasion to interpret the word 'agricultural product' or 'product of agriculture', wherein the Supreme Court held that the term `agricultural product' or `product of agriculture' is required to be construed liberally so as to include not merely the primary product as it actually grows, but also a product which undergoes a simple operation so as to make it more saleable or more usable. It was observed that the rice and the husk though separated remain as they were produced and hence continue to be `agricultural product' or `product of agriculture'.

28. In **Lipton India Ltd., Calcutta & etc. Vs. Bihar State Agricultural Marketing Board, Patna and Ors.**[8], the Court held that the products like 'Tree Top', 'Frooti' and 'Appy', which were ready-made beverages are agricultural produce and exigible to the levy of market fee under the Bihar Agricultural Produce Market Act, 1960.

29. Now coming to the contention as urged on behalf of the respondents that in respect of the notification in question, a clarification has been issued by a CBIC Circular dated 15 November 2017 and therefore, the authorities below were correct in their approach in

7 1993 3 SCC 727
8 1997 SCC OnLine Pat 288

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interpreting “Tea” as stored in the petitioner’s warehouse, is not an agricultural produce. We do not agree. Such contention as urged on behalf of the respondent is in teeth of the settled principles of law that a circular cannot whittle down or nullified the Exemption Notification. We may observe that Section 11 of the Central Goods and Services Act empowers the Government to grant exemption from tax on satisfaction, in the public interest and on the recommendations of the Council, by a notification, exempt generally, either absolutely or subject to such conditions as may be specified therein, from the whole or any part of the tax leviable thereon with effect from such date as may be specified in such notification. It is in the exercise of such power by Notification No.12 of 2017 in question the Government of India exempted the services under consideration from levy of the GST. Circular No. 15 of 2017 issued to the Principal Chief Commissioner and others, seeks to clarify the phrase “agricultural produce”, commenting on the activities which would not constitute agricultural produce. In our view, the clarification as contained in the Circular cannot amend the statutory notification. Under the guise of clarification, the notification No.12 of 2017 cannot be taken to be amended so as to delete ‘tea’ as an agricultural produce from the ambit of exemption. In such context reiterating the settled principles of law the

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Supreme Court in the case of “**Sandur Micro Circuits Ltd. vs. Commissioner of Central Excise, Belgaum**”[9] has held that a circular cannot take away the benefits of notifications statutorily issued. The following observations of the Supreme are required to be noted, which reads thus:-

> “6. The issue relating to effectiveness of a circular contrary to a notification statutorily issued has been examined by this Court in several cases. A circular cannot take away the effect of notifications statutorily issued. In fact in certain cases it has been held that the circular cannot whittle down the exemption notification and restrict the scope of the exemption notification or hit it down. In other words, it was held that by issuing a circular a new condition thereby restricting the scope of the exemption or restricting or whittling it down cannot be imposed. The principle is applicable to the instant cases also, though the controversy is of different nature.”

30. Similar view was taken by the Supreme Court in the case **TATA Teleservices Ltd. Vs. Commissioner of Customs**[10] while upholding the orders passed by the Andhra Pradesh High Court.

31. In so far as the impugned orders are concerned, on a perusal of the orders passed by the AAR the emphasis appears to be more on the issue that the process by which the tea leaves are dried which results in emergence of a manufactured product, and therefore, tea ceases to be an agricultural produce. In our opinion, such reasoning would in fact go

9 (2008)14 SCC 336
10 (2006)1 SCC 746

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contrary to the decisions of the Supreme Court as noted above for the reason that the essential characteristic of the tea being an 'agricultural produce' would not stand extinguish by mere processing and packing in whatever form. The AAAR has also not considered the decision of the AAR by applying the principles of law which were imperative to be applied and as discussed by us hereinabove. The only question in the present proceedings was in regard to the levy of service tax and whether the petitioner would be entitled to exemption when the petitioner had provided services of warehousing of agricultural produce. It was only in such context both the authorities below were required to consider the legal position and apply the same and any other extraneous consideration could not have been relevant.

32. In the aforesaid circumstances, we find ourselves in agreement with the petitioner when the petitioner contends that in the present case the Court would be required to issue a writ of certiorari by interfering in the orders impugned before us. It is settled principle of law that a writ of certiorari can be issued only when there is a failure of justice and that it cannot be issued merely because it may be legally permissible to do so. There must be an error apparent on the face of the record as the High Court acts merely in a supervisory capacity. An error apparent on the face

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of the record means an error which strikes one on mere looking and does not mean long drawn out process of reasoning on points where there may conceivably be two opinions. Such error should not require any extraneous matter to show its incorrectness. Such errors may include the giving of reasons that are bad in law or inconsistent, unintelligible or inadequate. It may also include the application of a wrong legal test to the facts found, taking irrelevant considerations into account and failing to take relevant considerations into account, and wrongful admission or exclusion of evidence, as well as arriving at a conclusion without any supporting evidence. Such a writ can be issued when there is an error in jurisdiction or authority whose order is to be reviewed has acted without jurisdiction or in excess of its jurisdiction or has failed to act. While issuing a writ of certiorari, the order under challenge should not undergo scrutiny of an appellate court. It is obligatory on the part of the petitioner to show that a jurisdictional error has been committed by the statutory authorities. There must be breach of the principles of natural justice for resorting to such a course. (**See para 28 in Sant Lal Gupta vs. Modern Co-op. Group Housing Society Ltd.;**[11] and **Ranjeet Singh Vs. Ravi Prakash**[12]**.** We find that there is an error of law apparent on the face of the record by both the

11 (2010) 13 SCC 336
12 AIR 2004 SC 3892

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forums below. Thus, when there is an error of law and when it is apparent, a writ of certiorari can be issued even if the authorities below has not transgressed their jurisdiction in any way. In such context Mr. Sridharan is also correct in placing reliance on the celebrated decision of the Supreme Court in **Hari Vishnu Kamat** (supra) where the Supreme Court has held that one of the grounds to issue a writ of certiorari is to correct an error of law which must be manifest on the face of the record.

33. In the aforesaid circumstances, we are inclined to allow this petition. It is accordingly, allowed in terms of prayer clause (a) and (b) which read thus:-

> "a) that this Hon'ble Court be pleased to issue a Writ of Certiorari or any other appropriate writ, order or directions under Article 226 of the Constitution of India calling for the records of the Petitioners' case and after examining the legality and validity thereof quash and set aside the impugned order dated 10.12.2018 passed by Respondent No.6 under Section 101 of the CGST Act and the MGST Act;
>
> b) that this Hon'ble Court be pleased to declare that the Petitioner is entitled to exemption from payment of GST in terms of SI. No.54(e) of the Notification 12/2017-Central Tax (Rate) dated 28.06.2017 and the corresponding notification issued under the MGST Act."

34. Rule is accordingly made absolute in the above terms. No costs.

(JITENDRA JAIN, J.) **(G. S. KULKARNI, J.)**

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