

DEPARTMENT OF STATE GOODS & SERVICES TAX, KERALA
PROCEEDINGS OF THE COMMISSIONER OF STATE TAX
U/s.94(7) OF THE KERALA VALUE ADDED TAX ACT, 2003.

Dr. Rajan N Khobragade IAS

Sub:- KVAT Act, 2003 - Revision U/s 94 (7) - Rate of tax of the commodities such as plastic tray, plastic containers, plastic box, plastic bowl and plastic lid - Orders issued.

Read:- Clarification Order No.C3/22114/16/CT dtd. 08.08.2017 u/s. 94 of the KVAT Act.

ORDER No.C3/22114/16/CT DATED 08/05/2018

1. M/s. Talash Plastopacks, Pappinisseri had preferred an application for clarification regarding the rate of tax of plastic tray, plastic containers, plastic box, plastic bowl and plastic lid. The applicant produced a certificate issued from the office of the Assistant Commissioner of Central Excise wherein it was clarified that the goods manufactured by the applicant would come under chapter heading 3923 of Central Excise Tariff Act as 'articles for the conveyance or packing of goods of plastics'. Relying on the certificate, the Authority had clarified vide paper read above that plastic tray, plastic containers, plastic box and plastic bowl would come under entry 174 of List A to the third schedule, bearing HSN code 3923 and hence would be taxable @ 5% and plastic lid would also be taxable @ 5% by virtue of entry 174 of list A to the third schedule bearing HSN code 3923.50.

2. The Audit party of the AG, on 07.12.2017, objected to the above clarification order on the ground that the applicant had declared the tariff head of their products as 3923.90.90 in the Central Excise Returns (ER-1) form. Since the audit objection is sustainable, it is decided to exercise the power vested in me u/s. 94(7) of the KVAT Act. Therefore, an opportunity for hearing was given to the dealer on 14.03.2018. The arguments raised by the authorised representative of the dealer are as detailed below:

(i) The dealer has argued that as per Finance Act 2012, 'carry bags' made of plastic which have a self carrying feature, commonly known as vest type bags or any other feature to carry commodities excluding 'D' punched bags' were included under Serial No 3 A to Clause A of Section 6 (1) of the KVAT Act 2003 taxable at 20%. Consequent to this amendment, Entry 174 of 3rd Schedule was amended by adding the words 'other than those specifically mentioned in Serial No (3) of Clause (A) of Subsection 1 of Section 6'. Thus the contention is that by this Amendment, Legislature has made it very clear that carry bags mentioned above is no longer included under the above Entry 174 of packing materials or articles for conveyance.

(ii) The dealer mentioned that as per Finance Act 2013, disposable plates, cups and leaves made of plastic were included under Table 3 A to Clause A of Section 6 (1) of KVAT Act and made it taxable at 20%. Then, Styrofoam cups and plates were also included in the above

Entry taxable at 20% by Finance Act 2015. Tumblers were also included under the above Entry vide Finance Act 2016.

(iii) Then the dealer argued that while making the above amendments as per Finance Act 2013, 2015 and 2016, Entry 174 is left untouched. This means that there are still articles of conveyance and packing made of plastic included under Entry 174. In short, by series of amendments, carry bags as described therein, disposable plates, cups and leaves, Styrofoam and Tumblers made of plastic alone have been carved out from Entry 174 and brought under Serial No 3 A of Table to A of Section 6 (1) of KVAT Act making the sale of them taxable at 20%. The items containers, trays, bowls, boxes etc are still out of Serial No 3 A of Table A of section 6 (1) of KVAT Act 2003 as articles of conveyance and packing materials, made of plastics are still in Entry 174 of List A, Third Schedule.

(iv) The dealer further argued that under Central Excise Act, the items Plates, Cups and Leaves made of plastic are still under HSN 3923, among other packing materials and articles of conveyance and hence they have included Cups, plates and containers, made of plastic, under Entry 3923.90.90 for the purpose of Central Excise Duty while filing ER1 Return. In other words, Plates, Cups and Leaves made of plastic have not been carved out from the main heading Packing Materials and Articles of conveyance in Central Excise Act, as has been done under KVAT Act 2003.

HSN 3923 as per Customs Tariff Act reads as follows,

"3923	Articles for the conveyance or packing of goods of plastics; stoppers, lids, caps and other closures of plastics
3923.10	Boxes, cases, crates and similar articles
3923.10.10	Plastic containers for audio or video cassettes, cassette tapes, floppy disc and similar articles
3923.10.20	.....
3923.10.30	.....
3923.10.40	.....
3923.10.90	Other
	Sacks and bags
3923.21.00	of polymers of ethylene
3923.29	Of other plastics

3923.90.20	Aseptic bags
3923.90.90	Other

(v) The dealer then contended that since the items such as cups, containers, etc, are made of plastic, Tariff 3923.90.90 is the most appropriate heading and therefore they have declared the above items under the heading 'Other' 3923.90.90, under the main heading 3923. All items for packing and conveyance, made of plastic are included in the main heading 3923. The Central Excise Duty leviable is 12.5%, whether the manufactured item is plastic cups, containers, trays or bowls etc. In other words, irrespective of the fact that the items manufactured are plastic cups, or plastic containers, so far as Central Excise Duty is concerned, it is 12.5%. But when it comes under KVAT Act the item plastic plates, cups and leaves were carved out from the Entry 174 List A of 3rd Schedule and put under Serial No 3 A Table to Section 6 (1) of the KVAT Act. Entry 174 List A of 3rd Schedule is the

corresponding HSN of 3923 which denotes the packing materials of all kinds of articles for conveyance or packing of goods of plastic. The item manufactured and sold is containers which come under the above heading.

(vi) The dealer has referred to the General Explanatory Additional Notes contained in Indian Customs Tariff Act and Rules of Interpretation of KVAT Act, which are extracted below.

"In this Schedule -

(1) (a) 'heading', in respect of goods means a description in list of tariff provisions accompanied by a four-digit number and includes all sub-headings of tariff items, the first four digits of which correspond to that number.

(b) 'sub-heading' in respect of goods means a description in the list of tariff provisions accompanied by a six digit number and includes all tariff items, the first six digits of which corresponds to that number.

(c) 'tariff item' means a description of goods in the list of tariff provisions accompanying eight digit number and rate of customs duty."

From the above provisions of Interpretation of Entries under Customs Tariff Act, it can be seen that all the six digit items comes under sub heading and all eight digit tariff items comes under the main four digit heading.

(vii) VAT Act 2003 contains Rules of Interpretation of Schedules

The commodities in the Schedules are allotted with Harmonised System of Nomenclature (HSN) as 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 in the Customs Tariff Act, 1975. Those commodities, which are not given with HSN Number, should be interpreted, as the case may be, in common parlance or commercial parlance. While interpreting a commodity, if any inconsistency 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.

HSN Numbers are allotted in the Schedules either in four digits or in six digits or in eight digits. The four digit numbers indicate the heading in the HSN classification, six digit numbers indicate the sub heading and the eight digit numbers indicate the specific commodity number (tariff item). While interpreting indicate the commodities in the Schedules, the following guidelines may be followed.

- i. The commodities which are given four digit HSN number shall include all those commodities coming under that heading of the HSN".
- ii. The commodities which are given six digit HSN number shall include all those commodities coming under that sub heading of the HSN.
- iii. The commodities which are given eight digit numbers shall mean that commodity which bears that HSN number.
- iv.

Where the term 'other' is used in sub entries or sub sub entries, it should be construed by using the doctrine of *Ejusdem Generis* (when specific words are followed by

general words, general words should be interpreted as having the meaning identical to the meaning attributed to the specific Rules).

(viii) Entry 174 of Third Schedule (List A Industrial Inputs and Packing Materials) reads as follows,

"Packing materials of all kinds, articles for conveyance or packing of goods of plastics, wood, paper, glass, jute; cartons, boxes and their waste sacks and bags [other than those specifically mentioned in Serial No (3) of clause (a) of sub section (1) of section (6)]"

1.	Boxes, cases, crates and similar articles of plastics	
a.	Plastic container for audio or video cassettes, cassette tapes, floppy discs and similar articles	3923.10.10
b.	.....	3923.10.20
c.	.....	3923.10.30
d.	.....	3923.10.40
e.	.....
2.	Sacks and bags (including cones) of plastic	
a.	.....	3923.21
b.	.....	3923.29.10
c.	.....	3923.29.90
3.	Carboys, bottles, flasks and similar articles of plastics including PET preforms	3923.30
4.	.....	3923.40
5.	Stoppers, lids, caps and other closures plastics	3923.50

The dealer argued that from the above Entries, it can be seen that under the main heading of Entry 174 of Third Schedule packing materials and articles of conveyance made of plastic, wood, paper, glass, jute, cartons, boxes, etc are included.

(ix) The dealer then argued that merely for the reason that raw materials of all products manufactured by the assessee are one and the same, it cannot be said that items manufactured by the assessee, is one and the same. The type and model are different, usage too is different. The plates, cups and leaves are different from containers. Container is an object like box or bottle which is used for holding something especially for the purpose carrying or storing etc. This usage is totally different from the usage of plates, cups and leaves. Plate is a flat dish, typically circular or square, where food is served or from which food is eaten, which cannot be used for packing. Cup is used for drinking only. Plates or cups do not have the ability for using as packing material, whereas, Container is an article for conveyance, which comes under Packing materials. Therefore they have returned the plastic containers and bowls under 5% goods as they come under Packing Materials or Articles of conveyance Entry 174 of the KVAT Act 2003. They have returned disposable cups made of plastic at 20% as this item comes under disposable plates, cups and leaves made of plastic as per Serial No 3 A to Clause A of Section 6 (1) of the KVAT Act 2003 taxable at 20%.

(x) By specifying the observation of AG "that the assessee took advantage of this ambiguity and conceded the turnover of disposable cups alone, at 20% and the remaining products at 5%", the dealer argued that in fact, there is no ambiguity. If at all there is

ambiguity, that provision has to be read in favour of the assessee. To support his claim, the dealer has referred to the judgment of the Hon'ble Supreme Court of India in Union of India v. Margadarshi Chit Funds P Ltd, [2018] 48 GSTR 1 (SC), wherein the Hon'ble Court has quoted the Constitution Bench decision of the Hon'ble Apex Court in Commissioner of Income Tax, New Delhi v. Vatika Township P Ltd as below,

"At the same time it is also mandated that there cannot be imposition of any tax without the authority of law. Such a law has to be unambiguous and should prescribe the liability to pay tax in clear terms. If the provisions concerned of the taxing statute is ambiguous and vague and is susceptible to two interpretations, the interpretation which favours the subjects, as against the Revenue has to be preferred. This is well established principle of statutory interpretation to help finding out as to whether particular category of assessee are to pay a particular tax or not. No doubt with the application of this principle, the courts make endeavour to find out the intention of the legislature. At the same time, this very principle is based on fairness doctrine as it lays down that if it is not very clear from the provisions of the Act as to whether the particular tax is to be levied to a particular class of persons or not, the subject should not be fastened with any liability to pay tax."

Therefore according to Audit, there is ambiguity and even if there is ambiguity, that ambiguity has to be interpreted in favour of the assessee.

(xi) The next observation of the AG is that the assessee has declared the turnover of plastic packing materials, cups, containers etc in ER - 1 Form to the Central Excise authorities under HSN 3923.90.90, "which suggests" that all the products manufactured, has the same characteristics. The cup and container are totally different, the former is used for drinking and the later is used for packing. Therefore the observation of AG that it has the same characteristics, is not correct. The decision cited above is mutatis mutandis applicable here also.

(xii) The dealer submitted that he has returned the items under KVAT Act 2003 under the main heading of Entry 174 of Third Schedule (List A Industrial Inputs and Packing Materials). There is no HSN 3923.90.90 under KVAT Act 2003. As per Entry 174 of the KVAT Act 2003, conveyance and packing of goods, made of plastics is taxable at 5%. Therefore the dealer returned sale of container under the above Entry as plastic container is a material for conveyance or packing made of plastic which have not been included under disposable plates, cups or leaves made of plastic in Serial No 3 A Table to Section 6 (1) of KVAT Act 2003.

(xiii) The view of the audit that the Clarification authority has taken the decision that plastic containers, boxes and bowls would come under Entry 174 List A, Third Schedule was based on the Certificate of Assistant Commissioner, Central Excise stating that "they are classifying the goods under Chapter heading 3923 of Central Excise Tariff Act 1985 as articles for the conveyance or packing of goods of plastic, stoppers, lids, caps and other closures of plastic attracting Central Excise Duty at 12.5% ad valorem." It is hardly understandable what is wrong in the Certificate of the Assistant Commissioner, Central Excise, warranting an interpretation to the effect that containers are taxable at 20% under KVAT Act 2003. HSN 3923.90.90 is sub sub Entry of HSN 3923 and therefore 3923.90.90 is included in the above heading.

(xiv) The AG has grossly erred in appreciating the Principles of Interpretation of Statutes. When the words are very clear and unambiguous by enlisting 20% items by none other than the legislature and has used the words 'Disposable plates, cups and leaves made of plastic', which requires hardly any emphasis that when the words are very clear disposable plates, cups and leaves made of plastic, alone would come under Entry 3A of Table A of section 6 (1) of the KVAT Act 2003.

3. The contentions raised were examined in detail.

4. The KVAT Act schedules are aligned with the Customs Tariff Act. The Central Excise Return and invoice produced by the dealer shows that the items dealt in by the dealer is having HSN code 3923 90 90. As per Rules of Interpretation of schedules, *the commodities which are given eight digit HSN Number shall mean that commodity which bears that HSN Number.* 8-digit numbers indicate a specific commodity number. In entry 174, in List A to the Third schedule, there is no heading with 4-digit HSN given. Six-digit sub-heading and eight-digit sub-sub-heading are given to sub-entries (1) to (11). Sub-entries (1) to (5) are having Heading No. 3923 followed by sub-Heading and sub-sub-Heading. In all these sub-Entries, there is no HSN code allotted with 3923.90.90, which means that the commodities covered under eight-digit HSN 3923.90.90 would not be taxable @ 5%. At the same time, these items would not come under the Table under sec. 6(1) of the Act. The HSN code also does not find a place in any of the schedules of the Act. Therefore, it definitely comes under Entry 103 of the SRO 82/2006 which covers goods not falling under any other entry of this list, or any Entry of the Schedules to the KVAT Act, 2003.

5. In such circumstances, the above commodities will not find a place in any of the schedules of the Act. In this case, there is no uncertainty or ambiguity in classifying items or goods bearing HSN code 3923.90.90 under Entry 103 of List A attached to SRO 82/2006 and therefore commodities such as plastic tray, plastic containers, plastic box, plastic bowl and plastic lid are taxable @ 12.5% / 13.5% / 14.5%, as the case may be.

The clarification order read above is modified to the above extent.

Commissioner

To

M/s. Talash Plastopacks,
Swaraj Plywood Road,
Pappinisseri, Kannur - 670 561