Clarifications - 2017

KERALA GST

Government of kerala

Foreword

The State GST Department is taking various initiatives to build the capacities of officers. One of the initiatives is publication of books on Clarifications and Circulars issued from time to time so as to get the information at one go. The book on Clarifications mainly gives information regarding the laws and rules to all the tax authorities as well as dealers and tax practitioners. The Circulars are issued to streamline the processes at the field level to achieve uniform application of processes and the laws.

We have published the books on Clarifications and Circular for the calendar year 2015 and 2016. We are now publishing the latest in series, Circulars of 2017 and Clarification of 2017.

The copies of books are available on website www.keralataxes.gov.in

These books will be of use for doing VAT works in the field offices. I look forward to suggestions from officers to improve tax administration. The suggestions may be sent on the email address cct.ctd@kerala.gov.in

I appreciate the works done by Shri Justin and the Team to compile the Circulars and Clarifications issued in the year

Dr Rajan Khobragade
Prl Secretary & Commissioner

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DEPARTMENT OF COMMERCIAL TAXES, KERALA
PROCEEDINGS OF THE AUTHORITY FOR CLARIFICATION
U/s.94 OF THE KERALA VALUE ADDED TAX ACT, 2003.

Members present are:

1. T.K. Ziavudeen.
Joint Commissioner (Law),
Office of the Commissioner of Commercial Taxes, Thiruvananthapuram.

2. Dr. A. Bijikumari Amma.
Joint Commissioner (A & I),
Office of the Commissioner of Commercial Taxes, Thiruvananthapuram.

3. N. Thulaseedharan Pillai.
Joint Commissioner (General),
Office of the Commissioner of Commercial Taxes, Thiruvananthapuram.

Sub :- KVAT Act, 2003 – Clarification U/s 94 – Rate of tax on Bakery Shortening (Inter Esterified Vegetable Oil) – Orders issued.

Read:- Application dtd. 13/12/10 from M/s. Parisons Foods Pvt. Ltd., Kozhikode.

ORDER No.C3/40710/10/CT DATED 22/02/2017

1. M/s. Parisons Food Pvt. Ltd. Kozhikode has preferred an application U/s 94 of the Kerala Value Added Tax Act, 2003, seeking clarification as to rate of tax on Bakery Shortening (Inter Esterified Vegetable Oil).

2. The applicant submits that as per Regulation 2.2.6.2 of the Food Safety and Standards (Food Products Standards and Food Additives) Regulations, 2011, the description of Bakery shortening is

> ***'2. Bakery shortening means vanaspati meant for use as a shortening or leavening agent in the manufacture of bakery products, that is, for promoting the development of the desired cellular structure in the bakery product with an accompanying increase in its tenderness and volume; this will also confirm to the standards prescribed in regulation 2.2.6 (1) excepts that—***
>
> ***(a) Trans fatty acids, not more than ten percent by weight.***
>
> ***(b) if aerated, only nitrogen, air or any other inert gas shall be used for the purpose and the quantity of such gas incorporated in the product shall not exceed 12 per cent by volume thereof.***
>
> ***(c) it may contain added mono-glycerides and diglycerides as emulsifying agents.***
>
> ***Test for argemone oil shall be negative.'***

3. The applicant would contend that the word used is 'mean' to define bakery shortening which is an exclusive definition, which means that no meaning can be attributed other than vanaspati meant for use as shortening.

4. The applicant has also detailed the manufacturing process of Bakery Shortening which is extracted hereunder:

> ***The first step in the making of bakery shortening is blending of various hydrogenated vegetable oils (vanaspati) and liquid refined vegetable oils to some proportions in a stainless steel blending vessel. All fractions of oil are properly melted and additives like Sesame Oil to the extent that it should give a B.T. Test of minimum value of 2 units, and Vitamin A & D is added to it (this additives is statutory requirement to avoid admixing of vanaspati in ghee). The contents are kept under agitation for 45 mins to get a homogenous mass. Then the vanaspati is passed through the equipments called Votators and Crystalisers which churn the product from 45 Deg Centigrade to 20-25 Deg Centigrade. The chilled vanaspati from this equipment is called Bakery Shortening. Bakery shortening may be packed in 15 kg packs and kept for tempering in air conditioned rooms for 1 day.***

5. The applicant would contend that Bakery Shortening (Inter-esterified Vegetable Oil) would fall under the HSN Group 1516 which reads:

1516		**ANIMAL OR VEGETABLE FATS AND OILS AND THEIR FRACTIONS, PARTLY OR WHOLLY HYDROGENATED, INTER-ESTERIFIED, RE-ESTERIFIED OR ELAIDINISED, WHETHER OR NOT REFINED, BUT NOT FURTHER PREPARED**
1516 10 00	**-**	**Animal fats and oils and their fractions**
1516 20	**-**	***Vegetable fats and oils and their fractions:***
	---	***Cotton Seed oil :***
1516 20 11	**----**	**Edible grade**
1516 20 19	**----**	**Other**
	---	***Groundnut oil :***
1516 20 21	**----**	**Edible grade**
1516 20 29	**----**	**Other**
	---	***Hydrogenated castor oil (opal-wax):***
1516 20 31	**----**	**Edible grade**
1516 20 39	**----**	**Other**
	---	***Other:***
1516 20 91	**----**	**Edible grade**
1516 20 99	**----**	**Other**

6. The applicant would contend that edible grades of inter-esterified vegetable oils fall under HSN 1516.20.11, 1516.20.21, 1516.20.31 and 1516.20.91 of the Customs Tariff Act. The said HSN Numbers appear in Entry 2B (18) of the Second Schedule (w.e.f. 1/4/2012). Prior to that it appeared in entry 38(19) of the Third Schedule to the Act.

7. The applicant would contend that going by the Rules of Interpretation of Schedules appended to the Act, when HSN Code is given against Entry 2B(18) of the Second Schedule, it should be given the same meaning as given to it under the HSN Classification. Relying on the judgment of the Apex Court in Reckitt Benckiser Case, the applicant would contend that where edible grades of inter-esterified vegetable oils falling under HSN 1516.20.11, 1516.20.21, 1516.20.31 and 1516.20.91 of the Customs Tariff Act have been included by a specific entry in the Second Schedule, Bakery Shortening (Edible grades of inter-esterified vegetable oils) will attract tax only at 1% (w.e.f. 1/4/2012).

Entry 2B(18) of the Second Schedule relied on by the applicant reads as follows:

2B Edible oils

(18) Other partly or wholly hydrogenated vegetable oils

(a) cottonseed oil	***1516.20.11***
(b) groundnut oil	***1516.20.21***
(c) castor oil	***1516.20.31***
(d) other including Vanaspati	***1516.20.91***

8. However, as per KFA-2014, the items stated above were once again included in the Third Schedule as Entry 38(18)(d), w.e.f. 1/4/2014. The said Entry reads as follows:

38 Edible oils

(18) Other partly or wholly hydrogenated vegetable oils

(a) Cottonseed oil	***1516.20.11***
(b) Groundnut oil	***1516.20.21***
(c) Castor oil	***1516.20.31***
(d) Others including Vanaspati	***1516.20.91***

9. The applicant would contend that the Heading of HSN 1516 of Indian Customs Tariff Act reads as under:

"Animal or vegetable fats and oils and their fractions, partly or wholly hydrogenated, inter-esterified, re-esterified or elaidinised, whether or not refined but not further prepared'

10. The applicant would contend that Bakery shortening being vanaspati would come under HSN 1516. All sub headings under the above main heading are included

in either Entry 38 or 138 of III schedule of the KVAT Act. As per the Rule of Interpretation of Schedules it has been clarified under Clause 25 that Entry 38 of the III schedule includes edible grade of all vegetable oils and under entry 138 of III schedule include all non-edible grade of vegetable oils.

11. The applicant would also contend that Bakery shortening is manufactured by hydrogenation of various edible oils which is subjected to sudden cooling. The resultant item is called bakery shortening. Vanaspati is also manufactured by hydrogenation of various edible oils which is subjected to cooling.

12. The applicant would also contend that Margarine is an edible mixture or preparation of animal or vegetable fats or oils or fractions of different fats or oils other than edible fats or oils or their fractions of Heading 1516. Margarine is included in HSN 1517 which comes under residuary Entry 64 of SRO.No.82/2006, liable to be taxed @ 12.5%. Entry 38(19)(d) of III schedule against HSN 1516.20.91 is 'other including vanaspati' under heading 'other partly or wholly hydrogenated vegetable oil' and entry 138 (18) (d) of III schedule against HSN 1516.20.99 is 'other' under heading 'other partly or wholly hydrogenated vegetable oil'. Both are liable to be assessed only @ 4% (and now @ 5%).

13. The applicant would also contend that they are producing bakery shortening which would come under entry 38(19)(d) of III schedule under the heading 'other partly or wholly hydrogenated vegetable oils' against HSN code 1516.20.91 or under entry 138(18)(d) against HSN code no.1516.20.99, if it is treated as non-edible as such. In either case, it is liable to be taxed at the rate of 4% (now at 5%) under III schedule goods.

14. The applicant would also contend that there was a dispute as to whether bakery shortening manufactured by them would be liable to be taxed at 12.5% or not during the year 2009-10. The Int. Officer (I.B), Kozhikode has taken a few samples of the bakery shortening manufactured by the applicant for examination as to whether it is different from vanaspati to assess the same at higher rate of tax @ 12.5%. The applicant would contend that it is understood that the Intelligence (I.B) Wing had sent the samples for testing to some laboratory and obtained the result to the effect that the bakery shortening manufactured by them is nothing but vanaspati.

15. The applicant would contend that all the edible vegetable oils and non-edible vegetable oils and oils connected therewith are included in III schedule. The applicant would also contend that the Constitutional Bench of Hon'ble Supreme Court of India in Dunlop India Ltd. Vs. Union of India 1977 AIR 597 has observed as below.

> ***"It is good fiscal policy not to put the people in doubt and quandary about their liability to duty. When a particular product like V.P. Latex known to trade and commerce of the country and abroad is imported it would have been better if the article is eo nomine put under a proper classification to avoid controversy over the residuary clause ……. When an article has by all standards a reasonable claim to be classified under an enumerated item in the Tariff Schedule it will be against the very principle of classification to deny it the parentage and consign it to an orphanage to a residuary clause'.***

16. The applicant would also contend that the Hon'ble High Court of Kerala in Malabar Food Products Vs. Commissioner of Commercial Taxes in writ petition 18740 and 17676/2007 dtd.20-06-2007 has clearly held that the Govt. has no authority to include any goods as taxable at 12.5% if the item is covered by clause (a) or (c) of Section 6(1) of the KVAT Act.

17. The applicant would further contend that the commodities in the schedules are allotted the code numbers which are developed by International Customs Organization as Harmonized System of Nomenclature (HSN); which is adopted by the Customs Tariff Act, 1975. The HSN numbers are allotted in the schedule either in four digits or in six digits or in eight digits. Four digit numbers indicate the heading in the HSN classification, six digit numbers indicate the sub heading and eight digit numbers indicate the specific commodity number. The commodities which are given six digit HSN numbers shall include all those commodities coming under that HSN and the commodities which are given eight digit HSN numbers shall mean that commodity which bears that HSN number.

18. The applicant would contend that as per Customs Tariff Act, the item included under HSN 1516.20.91 is edible grade under sub heading 'other'. Whereas, in the third schedule, under entry 38(19)(d) of KVAT Act, 2003 the entry against HSN 1516.20.91 is 'other, including vanaspati'. So, there is a difference between item in the third schedule of KVAT Act, 2003 and Customs Tariff Act under HSN 1516.20.91.

19. The applicant would contend that the item bakery shortening produced by them is not the mixture or preparations of vegetable fats or oils, but produced by

hydrogenation of palm oil. Therefore the item will not come under HSN 1517. Further, HSN 1517 start with Margarine followed by semi colon, which means that the following words clarify the earlier item Margarine. So in short if the item is to be included in HSN 1517, the item should be mixture or product of vegetable fat or oil. Vanaspati has been specifically included under Entry 38 (19) (d) as other including vanaspati against HSN 1516.20.99 under heading 'other partly or wholly hydrogenated vegetable oil'. So there is a slight deviation in this respect from the HSN allotted under the Customs Tariff Act. Therefore the number assigned under HSN 1517.90 for bakery shortening is not applicable in this case.

20. The applicant would also contend that Hon'ble CESTAT, Ahmedabad Bench in Adani Wilmar Ltd. Vs. Commissioner of Customs, Kandla reported in 2012 (278) ELT 663 has held that bakery shortening would come under Entry 1516.20.91.

21. The authorised representative of the applicant was heard in the matter and the contentions raised were examined.

22. The applicant has sought the tax rate applicable to 'bakery shortening'. Now, this commodity is not mentioned in any of the schedules of the KVAT Act. So, it has to be interpreted in the manner as understood in commercial parlance.

23. In India, 'Vanaspati' is used as a cheap substitute for vegetable ghee. It is usually made from palm oil. Hydrogenation is performed using a catalyst known as 'supported nickel catalyst', in reactors at low-medium pressure. Vanaspati ghee is very high in trans fats, which may compose up to 50% of vanaspati. Hydrogenation makes the oil less likely to spoil, and makes the food look less greasy. Vanaspati ghee is one of the most widely used edible cooking oils of the world. Besides cooking, it is also **used in various industries to produce many products such as soaps, skin products, candles, perfumes, and cosmetic products. Vanaspati can also be used to make 'ghee dosas'.**

24. Bakery shortening or emulsifier-type shortening is hydrogenated shortening to which an emulsifying agent has been added. This gives the shortening exceptional ability to blend with other ingredients. It is especially formulated to contribute a crumbly, crusty and flaky texture, and firm enough to support the

weight of the fillings as used in the making of cream sandwich cookies, decorative creaming pastries, and other bakery products.

25. Shortening is used in baking to impart tenderness, and improve flavour. Shortening is any fat that increases the tenderness of a baked product by preventing the cohesion of gluten stands during mixing. Shortenings are manufactured to have certain textures and hardness so that they will be particularly suited to certain uses.

26. In the process of manufacturing of bakery shortening, quick solidification, and subsequent crystallization function requires careful control. Generally, 8-12% nitrogen or air is introduced in chilled product to improve shortening textural appearance and colour. Aeration stabilizes the dough by making it more homogeneous, and improves its creaming properties by contributing gas to expand the dough and batter for subsequent baking operations. Bakery shortening contains added mono-glycerides and di-glycerides as emulsifying agents.

27. However, in the process of manufacturing of 'vanaspati', aeration is not carried out. Neither does 'vanaspati' contain added mono-glycerides and diglycerides as emulsifying agents. Vanaspati is devoid of the characteristics, as mentioned supra, for which bakery shortening is so widely known for. In the case of **M/s. Shree Gopal Vanaspati Ltd. v/s. C.C.(ICD), New Delhi**, the Hon'ble Customs, Excise & Service Tax Appellate Tribunal, after detailed examination of the technical material placed before them held that in the process of manufacturing of bakery shortening, fats and oils are further worked up by way of emulsification texturation to cause changes in the basic nature to make a product which is tender in nature. "Tariff Heading 15.17 of the Customs Tariff Act reads as under:

1517 ***MARGARINE; EDIBLE MIXTURE OR PREPARATIONS OF ANIMAL OR VEGETABLE FATS OR OILS OR OF FRACTIONS OF DIFFERENT FATS OR OILS OF THIS CHAPTER, OTHER THAN EDIBLE FATS OR OILS OR THEIR FRACTIONS OF HEADING 1516***

The explanatory notes to T.H 15.17 read as under:

The principal products under this heading are:

(a) Margarine (other than liquid margarine), which is a plastic mass, generally yellowish, obtained from fats or oils of animal or vegetable origin or from a mixture of these fats or oils. It is an emulsion of the water-in-oil type, generally made to resemble butter in appearance, consistency, colour etc.

(b) Edible mixtures or preparations of animal or vegetable or oil or of fractions of different fats or oils of this Chapter, other than edible fats or oils or their fractions of heading 15-16; for example limitation lard, liquid margarine and shortenings (produced from texturised oils or fats). The heading further includes edible mixtures or preparations of animal or vegetable fats or oils or of fractions of different fats or oils of this Chapter, of a kind used as mould release preparations".

The T.H. 15.17 further reads – 'The products of this heading, the fats or oils of which may previously have been hydrogenated, may be worked by emulsification (eg. with skimmed milk), churning, texturation (modification of the texture or crystalline structure) etc. and may contain small quantities of added lecithin, starch, colouring flavour, vitamins, butter or milkfat (subject to the restrictions in Note 1(c) to this Chapter). The heading also covers edible preparations made from a single fat or oil (or fractions thereof), whether or not hydrogenated, which has been worked by emulsification, churning, texturation etc.'

28. The Hon'ble Customs, Excise & Service Tax Appellate Tribunal, therefore held: "As shortenings are specifically mentioned in explanatory notes to T.H. 15.17 and these are in the nature of mixtures and preparations of animal or vegetable fats or oils, these are covered under 15.17 and hence not eligible for exemption under Notification No. 4/2005-CE dtd. 01.02.2004".

29. The Hon'ble Tribunal further held that "Commercial shortenings may include anti-oxidants to retard rancidity, and emulsifiers, to improve the shortening effect. Colours and flavours simulating butter may also be added". The Hon'ble Tribunal, thus held: "From the above technical material it is evident that shortenings are rightly classifiable under heading 15.17".

30. In this context, it would also be pertinent to extract the relevant portion of the public notice no. 07(RE-2008) 2004-07 New Delhi, 22nd April 2008, issued by the Director General of Foreign Trade, Department of Commerce, Ministry of Commerce and Industry, Govt. of India, with regard to the procedure for import of vegetable fats (vanaspati) under Indo-Sri Lanka Free Trade Agreement:

. *" The total quantum of import of vegetable Fats under Indo-Sri Lanka Free Trade Agreement shall be restricted to 2.5 lakh MT per annum. The details of the items included under this Quota shall be as under:-*

ITEM HS	*WCO Classification*	*Trade Classification*
1516.20	*Vegetable fats and oils and their fractions*	*Vanaspati*
1517.10	*Margarine, excluding liquid margarine*	*Margarine*
1517.90	*Other*	*Bakery Shortening*

31. Entry 38(18) of the Third schedule to the KVAT Act reads as follows

38 Edible oils

(18) Other partly or wholly hydrogenated vegetable oils

(a) Cottonseed oil	*1516.20.11*
(b) Groundnut oil	*1516.20.21*
(c) Castor oil	*1516.20.31*
(d) Others including Vanaspati	*1516.20.91*

So, entry 38(18) includes only partly or wholly hydrogenated vegetable oils like cotton seed oil, groundnut oil, castor oil and vanaspati will partake of the characteristics of the vegetable oils which precede the former's entry at 38(18)(d). However, bakery shortenings have certain peculiar characteristics, as mentioned supra, which make them particularly suited to specific uses in the baking industry. Hence, bakery shortening, though it may share some common characteristics with vanaspati, can be treated as standing on a different footing. Therefore, bakery shortening cannot be said to be covered under S. 38(18)(d) of the KVAT Act.

The HSN Code 1517 of the Custom Tariff Act reads as follows.

1517 MARGARINE; EDIBLE MIXTURE OR PREPARATIONS OF ANIMAL OR VEGETABLE FATS OR OILS OR OF FRACTIONS OF DIFFERENT FATS OR OILS OF THIS CHAPTER, OTHER THAN EDIBLE FATS OR OILS OR THEIR FRACTIONS OF HEADING 1516

1517 10	*-*	*Margarine, excluding liquid margarine:*
1517 10 10	*---*	*Of animal origin*
	---	*Of vegetable origin:*
1517 10 21	*----*	*Edible grade*
1517 10 22	*----*	*Linoxyn*
1517 10 29	*----*	*Other*
1517 90	*-*	*Other :*
1517 90 10	*---*	*Sal fat (processed or refined)*
1517 90 20	*---*	*Peanut butter*
1517 90 30	*---*	*Imitation lard of animal origin*
1517 90 40	*---*	*Imitation lard of vegetable origin*

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1517 90 90 --- Other

32. The decision of the Hon'ble Customs, Excise and Service Tax Appellate Tribunal mentioned supra, still holds goods as it has not been overruled by the higher forums. Further, taking into consideration the manufacturing process, and its specific use in the baking industry, it can be said that 'bakery shortening' plays unique role different from that played by vanaspati in the food industry. This renders bakery shortening widely acceptable in the commercial food industry, especially in the preparation of puffs, cream sandwich cookies, and decorative creaming pastries. Hence, bakery shortening is more similar in nature to margarine and, therefore, can be included under 1517.90 of the Tariff Heading 1517 of the Customs Tariff Act.

33. The HSN Code 1517.90 does not appear in any of the schedules to the Act. Since the KVAT Act is aligned with the Customs Tariff Act, and also going by the rules of interpretation of schedules appended to the Act, it can be clarified that the commodity, 'Bakery Shortening', classified under the HSN 1517.90 by the Director General of Foreign Trade, and also by the Hon'ble Customs, Excise & Service Tax Appellate Tribunal, New Delhi in the case of **M/s. Shree Gopal Vanaspati Ltd. v/s. C.C.(ICD), New Delhi** would be taxable @ 12.5%/13.5%/14.5% by virtue of Entry 103 of the SRO No. 82/2006.

The issues raised above are clarified accordingly.

T.K. Ziavudeen **Joint Commissioner (Law)** **O/o CCT**	**Dr. A. Bijikumari Amma** **Joint Commissioner (A&I)** **O/o CCT**	**N. Thulaseedharan Pillai** **Joint Commissioner (General)** **O/o CCT**

To

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DEPARTMENT OF COMMERCIAL TAXES, KERALA
PROCEEDINGS OF THE AUTHORITY FOR CLARIFICATION
U/s.94 OF THE KERALA VALUE ADDED TAX ACT, 2003.

Members present are:

1. T.K. Ziavudeen.
Joint Commissioner (Law),
Office of the Commissioner of Commercial Taxes, Thiruvananthapuram.

2. Dr. A. Bijikumari Amma.
Joint Commissioner (A & I),
Office of the Commissioner of Commercial Taxes, Thiruvananthapuram.

3. N. Thulaseedharan Pillai.
Joint Commissioner (General),
Office of the Commissioner of Commercial Taxes, Thiruvananthapuram.

Sub :- KVAT Act, 2003 – Clarification U/s 94 – Whether loading, unloading, stacking and transportation charges will form part of the taxable turnover – Orders issued.

Read:- Applications dtd. 05/07/16 & 14/07/16 from M/s. Kothamangalam Aggregates, Kothamangalam

ORDER No.C3/22584/16/CT DATED 21/01/2017

1. M/s. Kothamangalam Aggregates, Kothamangalam has preferred an application U/s 94 of the Kerala Value Added Tax Act, 2003, seeking clarification as to whether loading, unloading, stacking and transportation which are billed separately will form part of the turnover.

2. The applicant firm is a registered dealer under the rolls of Special Circle, Perumbavoor and is engaged in manufacturing and supply of PSC poles to Kerala State Electricity Board Ltd. The applicant firm has submitted that the firm procures raw materials including steel, cement, coarse aggregates, fine aggregates etc. and manufacture the PSC poles in its own factory and transport the same to various destinations in own vehicles as per the specific contract executed with KSEBL.

3. The applicant would contend that as per section 2(l) taxable turnover means

the turnover on which a dealer shall be liable to pay tax as determined after making such deductions from his total turnover and in such manner as may be prescribed:

From the definition of taxable turnover it is clear that only after making deductions from the total turnover, taxable turnover can be arrived.

4. The applicant would also contend that from the definition of taxable turnover read with Rule 10(e) of the KVAT Act it is clear that transporting charges, loading, unloading and stacking charges will not come within the definition of taxable turnover. Rule 10(e) is extracted below.

> *Rule 10. Determination of taxable turnover:- In determining the taxable turnover, the amounts specified in the following clauses shall, subject to the conditions specified therein, be deducted from the total turnover of the dealer.*
>
> *(e) all amounts falling under the following heads, when specified and charged for by the dealer separately, without including them in the price of goods sold:*
> *(i) freight*
> *(ii) charges for delivery*
> *(iii) cost of installation*

5. The applicant would further contend that they are supplying their goods to KSEB by way of a specific contract. The transportation charges and unloading & stacking charges received from KSEB is not a part of taxable turnover as they have charged transporting charges, loading, unloading and stacking charges separately. These expenses will come within the ambit of Rule 10(e) of KVAT Rules.

6. The applicant has also referred to the judgement of Hon'ble Supreme Court in Board of Revenue vs. Moideenkutty wherein it is held that "freight or transporting charges separately charged without including the same in the price of goods is an allowable deduction under Rule 9(f) of the KGST Act. Rule 9(f) of the KGST Act and Rule 10(e) of the KVAT Act are similar and hence the above mentioned decision of the Apex Court is binding.

7. The applicant has also contended that the Commissioner of Commercial Taxes has already clarified KSEB vide letter No. C4-2937/16/CT dtd. 17.06.16 that there is no tax liability for KSEB as purchaser of poles on account of transportation and delivery charges of poles and hence KVAT need not be paid on transportation and delivery charges to the pole manufacturers.

8. The applicant has requested to consider the following points while evaluating the matter.

a. As per the contract with KSEBL, the manufactured poles are tested by the KSEBL in the factory itself and accepted to their stock. The sale is concluded inside the factory itself. This is referred in clause 11 of purchase order as Pre-dispatch inspection and testing.

b. TDS is deducted on transportation and other delivery charges given. If transportation, loading, unloading and stacking charges were part of taxable turnover and part of sale bill, TDS would not have been deducted.

c. The ownership of pole is transferred to KSEBL by pre despatch inspection and testing. Thus the sale bill contains only basic price and applicable taxes. Transportation, loading, unloading and stacking charges etc. is a separate limb in the

contract and that is separately shown in the purchase order. Hence the same is billed separately. The order of the KVAT Appellate Tribunal, Palakkad in Order No. TA(VAT) Nos. 292/14 and 293/14 relied on a judgement issued by Hon'ble Supreme Court of India which discussed about a TNGST case and the Tribunal compare rule 10(e) of KVAT Act with rule 9(f) of TNGST Act. This should not be taken as bench mark for this matter as there is a decision of Hon'ble Supreme Court of India in the case – Board of Revenue vs. Moideenkutty.

d. The same subject matter was considered in detail by the STAT, Kochi and Hon'ble High Court of Kerala in KGST period has directed the assessing authority to decide on the matter "untrammeled by the observations of the tribunal and with an open mind after considering the contract and hearing the petitioner."

e. The request of the applicant to allow them to purchase trucks, tippers etc. in CST as the said trucks/tippers/dumpers/tractors etc are capital goods was rejected by the assessing authority and was also not allowed to take input tax credit for the same. It was rejected because the transportation, unloading and stacking charges were exempted as per rule 10(e) of KVAT Rules.

9. The request of the applicant is to clarify

a) whether loading, unloading, stacking and transportation which are billed separately will form the part of the taxable turnover.

b) whether they are eligible to purchase the trucks and tippers under CST.

10. The applicant was heard in the matter. But to proceed further, it seems essential to hear the part of KSEBL also.

11. KSEBL has submitted that as per the terms and conditions of the purchase orders, the basic price and transportation charges are listed separately in the schedule of prices. Hence, on a conjoint reading of Rule 10(e) and section 2(l) it is obvious that neither the manufacturer nor the Board is liable to pay the tax on transportation charges as the transportation, loading, unloading, stacking charges do not come under the purview of taxable turnover. Further, Rule 9(f) of the KGST Act and Rule 10(e) of the KVAT Act are similar in nature and the apex court in Board of Revenue vs. Moideenkutty observed that "freight or transporting charges separately charged without including the same in the price of goods is an allowable deduction under Rule 9(f) of the KGST Act.

12. KSEBL contends that the findings of the AG's audit is totally unfounded and illegal as the same is lacking bonafides. The same is a pulsating contrast to what has been enumerated in the statute.

13. KSEBL has further submitted that any detrimental decision in the matter will definitely be mutated into a potential protracted legal tussle between the Board and the manufacturer.

Further, the Board files the Aggregate Revenue Receipts and Expected Revenue from Charges before the Kerala State Electricity Regulatory Commission and get it approved for the smooth sailing of this organization. Hence, any undue burden by way of a retrospective tax liability will absolutely jeopardize the accounts of the Board. Moreover, the Commissioner of Commercial Taxes assured that the said transaction is not amenable to KVAT on transportation charges.

14. For the reasons stated supra, KSEBL has requested that the impugned assessments may be quashed.

15. The contentions raised by both the applicant and KSEBL were examined.

16. The applicant has entered into a contract with KSEBL for the manufacture and supply of 8m and 9m poles to Electrical circles of Perumbavoor and Thodupuzha for a period of two years. The scope of the contract agreement is clearly mentioned in the Annexure II of the Purchase Order. The agreement covers the design, manufacture, inspection, testing at supplier's works and delivery including unloading at site as per the technical specification and schedule in the tender, and its guarantee for satisfactory performance for a period of 18 months from the date of acceptance by the consignee. The clause dealing with 'price details' states that

"the rate is for the delivery of poles any where within the Electrical Circle concerned on intimation from the consignee concerned. The rates are inclusive of all expenses on account of all operations required for the scheduled supply of poles.

In case of necessity, the contractor shall be bound to supply poles to other circles also. In such cases, the supplier will be paid the transporting charges from the yard to the actual place of delivery. The per pole per km rate would be arrived at by dividing the transporting charges for supply within the circle by the average distance of transporting from the yard to various sections within the circle. In addition, loading, unloading and stacking charges also will be paid."

17. From the above, it is clear that the property of the goods passed on to the KSEBL only upon delivery of the same at the required site of the KSEBL and KSEBL's obligation to pay arose only after delivery had been so effected. The pre-dispatch inspection at the manufacturing yard of the applicant by the Engineer of KSEBL is only to confirm the quality of raw materials and its specification and nothing more. The ownership of the property is not transferred to the hands of the KSEBL at the time of inspection. This happens only at the time of delivery and stacking at required places. As per Sn. 2(xliv), sale price is inclusive of any sum charged for anything done by the dealer in respect of the goods or services at the time of or before delivery thereof. Hence it is clear that the transporting and other charges charged by the applicant would be taxable under the KVAT Act.

18. Moreover, the facts and circumstances of the case at hand are squarely covered by the decision of the Hon'ble Supreme Court of India in **India Meters Ltd. vs. State of TN** [(2011) 19 KTR 135 (SC)], which has been quoted with approval by the Hon'ble KVAT Additional Appellate Tribunal, Palakkad in **State of Kerala vs. M/s. Sivasakthi Engineering and Fabricators**. In both these decisions, it has been clearly stated that the rule permitting deduction of the cost on freight while determining the taxable turnover must be read in the context of definition of "turnover" as also the definitions of "sale" and "sale price" in section 2(lii), 2(xliii) and 2(xliv) of the KVAT Act respectively.

19. In the light of the above, the applicant would not be entitled to deduct loading, unloading, stacking and transporting charges even if shown separately in the invoice, from his total turnover, and the same would therefore, form part of the taxable turnover.

20. Regarding the second dispute raised by the applicant with regard to their eligibility to purchase trucks and tippers under the CST Act against 'C' forms, the same is not within the purview of sec. 94(1) of the Act, 2003 and, hence should be adjudicated by the assessing authority after considering the facts of the case.

The issues raised above are clarified accordingly.

T.K. Ziavudeen
Joint Commissioner (Law)
O/o CCT

Dr. A. Bijikumari Amma
Joint Commissioner (A&I)
O/o CCT

N. Thulaseedharan Pillai
Joint Commissioner (General)
O/o CCT

To

M/s. Kothamangalam Aggregates,
Ayroorpadam, Kothamangalam – 686 692

The Director (Finance),
Kerala State Electricity Board Ltd.

5

DEPARTMENT OF COMMERCIAL TAXES, KERALA
PROCEEDINGS OF THE AUTHORITY FOR CLARIFICATION U/s.94 OF THE KERALA VALUE ADDED TAX ACT, 2003.

Members present are:

1. Dr. A. Bijikumari Amma.
Joint Commissioner (A & I),
Office of the Commissioner of Commercial Taxes, Thiruvananthapuram.

2. N. Thulaseedharan Pillai.
Joint Commissioner (General),
Office of the Commissioner of Commercial Taxes, Thiruvananthapuram.

3. S. Anil Kumar.
Deputy Commissioner (Internal Audit),
Office of the Commissioner of Commercial Taxes, Thiruvananthapuram.

Sub :- KVAT Act, 2003 – Clarification U/s 94 – Rate of tax applicable for JCB excavator – Orders issued.

Read :- Application dtd. 22/07/2015 from M/s. Christ Knowledge City, Ekm.

ORDER No.C3/26486/15/CT DATED 06/03/2017

1. M/s. Christ Knowledge City has preferred an application U/s 94 of the Kerala Value Added Tax Act, 2003, seeking clarification on the rate of tax of used JCB excavator.

2. The applicant submits that it is a charitable trust and is running an educational institution. They have purchased 'JCB 3DX EXCAVATOR LOADER' from M/s. India Techs Limited, Kochi paying tax at the rate of 12.5% on 31.03.2009. Then the vehicle was registered with the Motor Vehicles Department on 01-04-2009 and was sold to Mr. Siraj on 18-04-2013.

3. The applicant has therefore requested to clarify the rate of tax of used JCB Excavator.

4. The authorised representative of the applicant was heard in the matter and the contentions raised were examined.

5. The subject matter for clarification was examined earlier and as per order No. C3/31587/13/CT dtd. 05/04/14 it was clarified that *'Excavators fall under the HSN Code 8429, classified under the Customs Tariff Act Chapter 'Machinery'. The said HSN Code does not appear in any of the Schedules to the Kerala Value Added Tax Act, 2003. None of the entries in any of the*

Schedules is suitable for incorporating this commodity. As such the commodity excavator, whether new or used, would fall under Entry 15 of S.R.O. No. 82/2006. Accordingly the tax liability of a dealer, dealing in this item would be determined as per sec. 6(1)(d) of the Kerala Value Added Tax Act, 2003.'

6. In the light of the above clarification, it is hereby clarified that the rate of tax applicable for used JCB excavator is 14.5 %.

The issues raised above are clarified accordingly.

Dr. A. Bijikumari Amma **Joint Commissioner (A&I)** **O/o CCT**	**N. Thulaseedharan Pillai** **Joint Commissioner (General)** **O/o CCT**	**S. Anil Kumar** **Deputy Commissioner (Internal Audit)** **O/o CCT**

To

Sri.P.N.D.Namboothiri,
Advocate,
Ernakulam Road, Aluva
Pin. 683 101

2

DEPARTMENT OF COMMERCIAL TAXES, KERALA
PROCEEDINGS OF THE AUTHORITY FOR CLARIFICATION U/s.94 OF THE KERALA VALUE ADDED TAX ACT, 2003.

Members present are:

1. T.K. Ziavudeen.
Joint Commissioner (Law),
Office of the Commissioner of Commercial Taxes, Thiruvananthapuram.

2. Dr. A. Bijikumari Amma.
Joint Commissioner (A & I),
Office of the Commissioner of Commercial Taxes, Thiruvananthapuram.

3. N. Thulaseedharan Pillai.
Joint Commissioner (General),
Office of the Commissioner of Commercial Taxes, Thiruvananthapuram.

Sub :- KVAT Act, 2003 – Clarification U/s 94 – Manufacturing and supplying of steel channel sleepers – interstate works contract – liability for TDS – Orders issued.

Read:- Application dtd. 03/01/2017 from M/s. Eastern Hardware Mart, Kolkata.

ORDER No.CT/1117/2017-C3 DATED 25/03/2017.

1. M/s. Eastern Hardware Mart, Kolkata has preferred an application U/s 94 of the Kerala Value Added Tax Act, 2003, seeking clarification as to whether the works contract entered into by the applicant with M/s. Southern Railway is an interstate works contract or not.

2. The applicant is a dealer situated in the State of West Bengal holding TIN 19260371023 and CST No. 24560101340.

3. The applicant has submitted that they have been awarded a works contract by the Southern Railway, Thiruvananthapuram for the renewal of Corroded Steel Channel Sleepers in Br. No. 402 Ernakulam-Kottayam section.

4. The applicant has further submitted that the works contract is for manufacturing, supplying and fixing of BG galvanized steel channel sleepers along with all fittings and fixtures. The applicant has also submitted that the authorised inspecting authority of Railways 'Rites Ltd.' had inspected the factory of the contractor at Hawrah and issued certificate before supplying the material. The captioned materials were moved from the factory at Hawrah only after the inspection. Based on the works contract agreement the materials supplied from

West Bengal and fixed the same in the specified areas of the Railway line in Ernakulam-Kottayam under Southern Railway.

5. The applicant has requested to clarify whether the above work is an interstate works contract and whether the provisions of TDS under the KVAT Act is applicable in this case.

6. The authorised representative of the applicant was heard in the matter and the contentions raised were examined.

7. The Supreme Court of India in the case **Union of India Vs. K.G. Khosla and Co. Ltd. (43 STC 457)** had held that what is really decisive is whether the sale is one which has occasioned the movement of goods from one State to another. The questions regarding interstate sale is to be answered on the basis of section 3 of the Central Sales Tax Act. The law requires that it should be levied and collected in the State from which the movement of goods commences. The movement of goods in pursuance of the agreement is the main criteria for fixing the situs of taxation [**Bharat Heavy Electricals Vs. Union of India** 102 STC 382]. A sale is an interstate sale under section 3, if there is a contract of sale preceding the movement from one state to another and the movement must be the result of this covenant [Indian Oil Corporation 47 STC 5]. In **Builders Association of India Case** [73 STC 394], it was held that if in the process of executing a works contract, a transfer of property in the goods take place outside the State, the State would have no power to levy sales tax on such a transfer. In **Larsen and Toubro Ltd. Vs. Commissioner of Commercial Taxes** (2003) 132 STC 272 (AP) it was held that, if movement of goods from outside the state was occasioned by contract and Central Sales Tax is paid in the State of origin, no local taxes are leviable.

8. The applicant has produced copies of the agreement with M/s. Southern Railway and inspection report issued by “Rites Ltd.”, the authorized inspecting authority of Railways. As per the terms of the contract, the work would be supervised by competent personnel of the awarder and the work would have to be done as per his direction. The materials that are to be supplied and used for the work by the contractor would have to be got approved by the Engineer-in-charge before use. New channel sleepers are to be fixed as per Railway’s approved drawings. The finished steel channel sleepers and grooved steel pad plates which are inspected and passed for the work by the nominated railway officials, should only be brought to the work site by the contractor.

9. Thus, from the terms of the contract it is clear that the goods used in the works contract are of specific quality and description, which are manufactured at the contractor's factory in Kolkata, and which are subject to strict inspection by the personnel of the awarder. Hence, there is no possibility of such goods being diverted by the dealer for any other purpose. In fact, the authorised inspecting body of the awarder, ie., 'RITES', after undertaking inspection of the galvanized steel channel sleepers, and fittings manufactured by the contractor/applicant, has issued an 'Inspection Certificate'.

10. In the circumstances, and as per the copy of agreement produced before this authority, the transaction involved is an interstate works contract for which the applicant is not liable to pay any tax under the KVAT Act.

The issues raised above are clarified accordingly.

T.K. Ziavudeen Thulaseedharan Pillai
Joint Commissioner (Law)
O/o CCT

Dr. A. Bijikumari Amma
Joint Commissioner (A&I)
O/o CCT

N.
Joint Commissioner (General)
O/o CCT

To

Sri. B.Prabhakaran,
Advocate,
T.C.14/765, Observatory Lane,
Palayam, Tvpm. - 33

DEPARTMENT OF COMMERCIAL TAXES, KERALA
PROCEEDINGS OF THE AUTHORITY FOR CLARIFICATION
U/s.94 OF THE KERALA VALUE ADDED TAX ACT, 2003.

Members present are:

1. T.K. Ziavudeen.
Joint Commissioner (Law),
Office of the Commissioner of Commercial Taxes, Thiruvananthapuram.

2. Dr. A. Bijikumari Amma.
Joint Commissioner (A & I),
Office of the Commissioner of Commercial Taxes, Thiruvananthapuram.

3. N. Thulaseedharan Pillai.
Joint Commissioner (General),
Office of the Commissioner of Commercial Taxes, Thiruvananthapuram.

Sub :- KVAT Act, 2003 – Clarification U/s 94 – Rate of tax of Blended Edible Vegetable Oil – Orders issued.

Read:- Application dtd. 12-04-13 from M/s. KOG-KTV Food Products (India) Pvt. Ltd.

ORDER No.C3/11060/13/CT DATED 29/03/2017

1. M/s. KOG-KTV Food Products (India) Pvt. Ltd. has preferred an application U/s. 94 of the Kerala Value Added Tax Act, 2003, seeking clarification as to the rate of tax of Blended Edible Vegetable Oil.

2. The applicant has submitted that their product is Blended Edible Vegetable Oil which is an admixture of 80% refined palm kernel oil and 20% edible coconut oil. In change of circumstances, other edible vegetable oil can be blended in spite of palm kernel oil and coconut oil. Accordingly, ratio of admixture can be changed.

3. The applicant would contend that as per the Food Safety & Standard Regulation, 2011, *Blended edible vegetable oil means an admixture of any two edible vegetable oils where the proportion by weight of any edible vegetable oil used in the admixture is not less than 20 percent.* The individual oils in the blend shall conform to the respective standards prescribed in these regulations. The applicant has obtained an Agmark Certificate of authorisation issued under the provisions of the Agricultural Produce (Grading & Marking) Act, 1937 for making blended edible vegetable oil.

4. The applicant placed his reliance on the judgment of the Hon'ble Supreme Court of India in Commissioner of Central Excise, Bangalore vs. Osnar Chemical (P) Ltd. wherein it is held that it could not be said that mixing of some material would amount to manufacture unless it results in a change when the commodity concerned cannot be recognised as an original commodity but rather new and distinct article emerges having different commercial use and identity.

5. The applicant has then argued that even after mixing of 80% refined palm olien oil and 20% coconut oil, the resultant product remains edible oil and entry number 38(17) of the III schedule is 'other edible oils' with HSN code 1515.90.91. As per the rule of ejusdem generis 'other edible oils' will also include 'Blended Edible Vegetable Oil'. In the rules of interpretation of schedules given as appendix after the schedules under guideline number V it has been stated that where the term 'other' is used in sub-entries or sub-sub entries, it should be construed by using the doctrine of ejusdem generis. The rule of ejusdem generis states when specific words are followed by general words, the general words should be interpreted as having the meaning identical to the meaning attributed to the specific words.

6. The applicant has further argued that all the items ie., items 38(1) to 38(16) given in the III schedule which precede item number 38(17) namely other edible oils are specific entries and entry number 38(17) is other edible oils which is a general entry. All items from 38(1) to 38(16) are edible vegetable oils fit for human consumption and therefore blended edible vegetable oil which is a AGMARK certified quality vegetable oil fit for human consumption will come under other edible oils under entry number 38(17) of the III schedule of the KVAT Act taxable at 5% as per the rule of 'ejusdem generis'. The applicant has also argued that in the rules of interpretation of schedules given as appendix after the schedules under item 25 in guideline number VI, it has been stated that entry 38 of the III schedule includes only the edible grade of vegetable oils.

7. The applicant has requested to clarify the rate of tax applicable for the above product.

8. The authorised representative of the applicant was heard in the matter and the contentions raised were examined.

9. Blending different oils with various properties give us a new oil with improved functional characteristics and application in the finished product. For instance, some oils tend to crystalize and change their clarity when cooled. Studies

show that mixing these oils with higher and more unsaturated oils give a more stable and clear mixture which remains stable during storage. Blending oils lead to changes in triacyl glycerol profile, and, therefore, to changes in the physical properties of oils such as cloud points, solid fat contents, sensory quality, smoke point, density and viscosity. Blending has an effect on the chemical properties of the oils used in the mixture. Mixing different vegetable oils can change fatty acid composition and give higher levels of natural anti-oxidants and bio-active lipids in the blends, and, therefore, can improve the nutritional value and stability of oils.

10. However, blending does not result in manufacture of a new and different article having a different identity, characteristic and use. The end product, even after blending, still remains an edible vegetable oil. It is well settled that mere improvement in quality does not amount to manufacture. The word 'manufacture' used as verb is generally understood to mean as 'bringing into existence a new substance' and does not mean merely 'to produce some change in a substance, however minor in consequence the change may be.

11. Heading 1518 under Chapter 15 of the Customs Tariff Act reads as follows:

Animal or vegetable fats and oils and their fractions, boiled, oxidised, dehydrated, sulphurised, blown, polymerised by heat in vacuum or in inert gas or otherwise chemically modified, excluding those of heading 1516.

Entry 38(19)(c) of the Third schedule to the KVAT Act, bearing HSN 1518.00.31 reads: *'Other vegetable oils edible grade'*. The corresponding entry under the Customs Tariff Act reads: *'Edible grade'.*

12. In the light of the above, it is clarified that 'Blended Edible Vegetable Oil' would come under entry 38(19)(c) of the third schedule to the KVAT Act, and, hence, would be taxable at 5%.

The issues raised above are clarified accordingly.

T.K. Ziavudeen
Joint Commissioner (Law)
O/o CCT

Dr. A. Bijikumari Amma
Joint Commissioner (A&I)
O/o CCT

N. Thulaseedharan Pillai
Joint Commissioner (General)
O/o CCT

To

M/s. KOG-KTV Food Products (India) Pvt. Ltd.,
C-85, 2nd Main Road, SIPCOT Complex,
Tuticorin-628 008

DEPARTMENT OF COMMERCIAL TAXES, KERALA
PROCEEDINGS OF THE AUTHORITY FOR CLARIFICATION U/s.94 OF THE KERALA VALUE ADDED TAX ACT, 2003.

Members present are:

1. T.K. Ziavudeen.
Joint Commissioner (Law),
Office of the Commissioner of Commercial Taxes, Thiruvananthapuram.

2. Dr. A. Bijikumari Amma.
Joint Commissioner (A & I),
Office of the Commissioner of Commercial Taxes, Thiruvananthapuram.

3. N. Thulaseedharan Pillai.
Joint Commissioner (General),
Office of the Commissioner of Commercial Taxes, Thiruvananthapuram.

Sub :- KVAT Act, 2003 – Clarification U/s 94 – Compounding u/s. 8(c)(i) for financial year 2012-13 – Dealer effecting interstate purchase – eligibility of compounding - Orders issued.

Read:- Application dtd. 04-11-16 from Sri. Anirudhan.V

ORDER No.CT/769/17-C3 DATED 12/04/2017

1. Sri. Anirudhan.V, Thrissur has preferred an application U/s 94 of the Kerala Value Added Tax Act, 2003 seeking clarification as to whether interstate purchase of goods can be done during the year 2012-13, who opts for compounding u/s. 8(c) of the KVAT Act.

2. The applicant was heard in the matter and the contentions raised were examined.

3. Sec. 8(c)(i) of the KVAT Act related to the year 12-13 reads as under:

Any dealer in cooked food and beverages, including beverages prepared by him, other than a dealer supplying cooked food or beverages to any airline service company or institution or shipping company for serving in air craft, ships or steamer or served in air craft, ship, steamer, bar attached hotel or star hotel may, at his option, instead of paying tax in accordance with the provisions of sub-section (1) of section 6 but subject to payment of tax, if any, payable under sub-section (2) thereof, pay tax at half per cent of the turnover of cooked food and beverages prepared by him and also on the turnover of other goods in respect of which he is not the dealer effecting first taxable sale, as defined in the explanation under sub-section (5) of section 6.
Explanation:- Cooked food for the purpose of this clause shall include sweets and fresh fruit juice prepared and served in the restaurants and hotels.

4. As per the provisions that existed during the year 2012-13, a dealer in cooked food and beverages, could also have paid compounded tax @0.5% on the turnover of other goods in respect of which he is not the dealer effecting first taxable sale in addition to the turnover or cooked food and beverages. Further, the following categories of dealers could not opt for compounding u/s. 8(c)(i).

A dealer supplying cooked food or beverages to

i) Any airline service company or institution or shipping company for serving in aircrafts, ship or steamer or served in aircraft, ship, steamer.

ii) bar attached hotel or star hotel.

5. In the light of the above, it is hereby clarified that there was no bar on any dealer in cooked food and beverages, who had opted to pay compounded tax u/s. 8(c)(i), for effecting interstate purchase of cooked food and beverages for the period prior to 01.04.2014.

The issues raised above are clarified accordingly.

T.K. Ziavudeen	**Dr. A. Bijikumari Amma**	**N. Thulaseedharan Pillai**
Joint Commissioner (Law) (General)	**Joint Commissioner (A&I)**	**Joint Commissioner**
O/o CCT	**O/o CCT**	**O/o CCT**

To

Sri. Anirudhan.V., DST,
Thrithira, Main Road,
Wadakanchery - 680582

DEPARTMENT OF COMMERCIAL TAXES, KERALA

PROCEEDINGS OF THE AUTHORITY FOR CLARIFICATION U/s.94 OF THE KERALA VALUE ADDED TAX ACT, 2003.

Members present are:

1. T.K. Ziavudeen.
Joint Commissioner (Law),
Office of the Commissioner of Commercial Taxes, Thiruvananthapuram.

2. Dr. A. Bijikumari Amma.
Joint Commissioner (A & I),
Office of the Commissioner of Commercial Taxes, Thiruvananthapuram.

3. N. Thulaseedharan Pillai.
Joint Commissioner (General),
Office of the Commissioner of Commercial Taxes, Thiruvananthapuram.

Sub :- KVAT Act, 2003 – Clarification U/s 94 – whether recording of audio cassettes on duplicating music system amounts to manufacture - Orders issued.

Read:- Application dtd. 09-08-16 from M/s. Christian Revival Fellowship Trust, Ernakulam

ORDER No.CT/3177/16-C3 DATED 12/04/2017

1. M/s. Christian Revival Fellowship Trust, Ernakulam has preferred an application U/s. 94 of the Kerala Value Added Tax Act, 2003 seeking clarification as to whether recording of audio cassettes on duplicating music system amounts to manufacture.

2. The applicant is a charitable institution registered u/s. 12A of the Income Tax Act and is also a presumptive dealer. The applicant submits that they deal in items such as music discs, CDROM, CDRS, Pre-recorded and Compact Discs and printed books.

3. The applicant has requested to clarify whether the sale of pre-recorded compact discs (after purchasing blank audio cassette and recording) covered under the category of "dealer effecting first taxable sales of goods within the state" and recording of audio cassettes on duplicating music system amounts to manufacture.

4. The applicant was heard in the matter and the contentions raised were examined.

5. The issue sought to be clarified is squarely covered by the decision of the Hon'ble Supreme Court of India in the case of **Commissioner of Income Tax-V, New Delhi vs. M/s. Oracle Software India Ltd.** In the said case, the Hon'ble Supreme Court analyzed the facts presented before it in the context of computer technology and held that complex technical nuances were required to be kept in mind while deciding the issue on hand. The term "manufacture" implied a change, but, every change was not a manufacture, despite the fact that every change in an article was the result of a treatment of labour and manipulation. If an operation/process rendered a commodity or article fit for use for which it was otherwise not fit, the operation/process fell within the meaning of the word "manufacture".

6. The Hon'ble Supreme Court held that the blank CD was an input. By the duplicating process undertaken by the assessee, the recordable media which was unfit for any specific use got converted into the programme which was embedded in the Master Media and, thus, blank CD got converted into recorded CD by the afore-stated intricate process. The duplicating process changed the basic character of a blank CD, dedicating it to a specific use. Without such processing, blank CDs would be unfit for their intended purpose. Therefore, processing of blank CDs, dedicating them to a specific use, constituted a "manufacture" in terms of sec. 80IA(12)(b) read with sec. 33B of the Income Tax Act.

7. The Hon'ble Supreme Court quoted with approval the decision of the same court in **TCS vs. State of Andhra Pradesh**, wherein it was held that a software programme put in media for transferring or marketing was "goods" under sec. 2(h) of the Andhra Pradesh General Sales Tax Act, 1957. The Hon'ble Supreme Court in that case, held that even an intellectual property, once put on to a media, whether be it in the form of a computer disc or cassette and marketed, it became goods. It was further held that there was no difference between a sale of a software programme on a CD/floppy from a sale of music on a cassette/CD.

8. The Hon'ble Supreme Court also quoted with approval the decision of the same court in **Gramaphone Co. Of India Ltd. Vs. Collector of Customs, Calcutta**, wherein it was held that an input/raw material in the above process was a blank audio cassette. It was further held that recording of an audio cassette on duplicating music system amounted to "manufacture" because blank audio cassette was distinct and different from pre-recorded audio cassette and the two had different uses and names.

9. In the light of the above, it is hereby clarified that sale of pre-recorded compact discs are covered under the category of "dealer effecting first taxable sale of goods within the State" for the purpose of sec. 6(5). It is also clarified that recording of audio cassettes on duplicating music system amounts to "manufacture".

The issues raised above are clarified accordingly.

T.K. Ziavudeen **Joint Commissioner (Law)** **O/o CCT**	**Dr. A. Bijikumari Amma** **Joint Commissioner (A&I)** **O/o CCT**	**N. Thulaseedharan Pillai** **Joint Commissioner (General)** **O/o CCT**

To

CA. P.J.Johney,
Johney & Co., Chartered Accoutants,
J & Co Chambers, Manimala Road,
Edappally, Kochi-24

DEPARTMENT OF COMMERCIAL TAXES, KERALA
PROCEEDINGS OF THE AUTHORITY FOR CLARIFICATION U/s.94 OF THE KERALA VALUE ADDED TAX ACT, 2003.

Members present are:

1. T.K. Ziavudeen.
Joint Commissioner (Law),
Office of the Commissioner of Commercial Taxes, Thiruvananthapuram.

2. Dr. A. Bijikumari Amma.
Joint Commissioner (A & I),
Office of the Commissioner of Commercial Taxes, Thiruvananthapuram.

3. N. Thulaseedharan Pillai.
Joint Commissioner (General),
Office of the Commissioner of Commercial Taxes, Thiruvananthapuram.

Sub :- KVAT Act, 2003 – Clarification U/s 94 – Rate of tax for hydrogen, carbon monoxide, mixture of carbon monoxide and hydrogen (synthesis gas), steam, nitrogen, oxygen, naphtha & natural gas - Orders issued.

Read :- Application dtd. 11-02-2013 from M/s. Prodair Air Products India Private Ltd., Pune.

ORDER No.C3/5133/13/CT DATED 03/07/2017

1. M/s. Prodair Air Products India Private Ltd., Pune has preferred an application U/s 94 of the Kerala Value Added Tax Act, 2003 seeking clarification as to Rate of tax for hydrogen, carbon monoxide, mixture of carbon monoxide and hydrogen (synthesis gas), steam, nitrogen, oxygen, naphtha & natural gas and also whether company will be entitled to a refund of the excess VAT paid on the inputs.

2. The applicant has submitted that the company is evaluating a green field investment in Kochi for an industrial gas generation facility that would primarily supply high quality, critical industrial gases to large customers in Kochi. The applicant has also submitted that main raw materials used for the manufacturing of the industrial gases are Natural gas, and Naphtha. The raw materials are processed through extensive technical process to produce Hydrogen gas, Nitrogen gas, Oxygen gas, Gaseous mixture of hydrogen and carbon monoxide, and steam.

3. The applicant would contend that sub-section (3) & (5) of section 11 provide for the restrictions in availing input tax credit. Reading the above sub-sections, the Act provides for limiting the input tax only when the sale price is

lesser than the purchase price (2nd proviso) or when the goods are sent to outside the State through stock transfer (3rd proviso). Therefore reading the various provisions of the Act, there is no provision to restrict the input tax paid on the purchase of inputs on the ground that the rate for the output is less than the rate of tax for the inputs. The applicant would contend that the dealer is entitled for refund of excess input tax paid in the above factual situation.

4. The applicant has requested to clarify

a. rate of tax for the individual products:- Hydrogen, carbon monoxide, mixture of carbon monoxide and Hydrogen (synthesis gas), steam, Nitrogen, Oxygen, Naphtha, Natural Gas;

b. whether Company will be entitled to a refund of the excess VAT paid on the inputs.

5. The applicant was heard in the matter and the contentions raised were examined.

6. The clarification sought regarding refund of the excess VAT paid on the inputs is purely a fact related one and hence it does not come within the purview of sec. 94(1) of the Act.

7. Regarding rate of tax of the commodities, it is hereby clarified that the commodities hydrogen, nitrogen, oxygen and naphtha would be taxable @5% by virtue of entries 78(1), 78(4), 78(5)(b) and 92A of the List A to the Third schedule respectively. There is no specific entry for the commodities such as carbon monoxide, mixture of carbon monoxide and hydrogen (synthesis gas), steam and natural gas. As such, carbon monoxide, mixture of carbon monoxide and hydrogen (synthesis gas), steam and natural gas would be taxable at the rate of 14.5% by virtue of entry 103 of SRO No. 82/2006.

The issues raised above are clarified accordingly.

T.K. Ziavudeen	**Dr. A. Bijikumari Amma**	**N. Thulaseedharan Pillai**
Joint Commissioner (Law) (General)	**Joint Commissioner (A&I)**	**Joint Commissioner**
O/o CCT	**O/o CCT**	**O/o CCT**

To

M/s. R.Krishna Iyer & Co.,
Chartered Accountants,
'134', Jyothy,
Panampilly Nagar, Kochi – 682 036

DEPARTMENT OF COMMERCIAL TAXES, KERALA
PROCEEDINGS OF THE AUTHORITY FOR CLARIFICATION U/s.94 OF THE KERALA VALUE ADDED TAX ACT, 2003.

Members present are:

1. T.K. Ziavudeen.
Joint Commissioner (Law),
Office of the Commissioner of Commercial Taxes, Thiruvananthapuram.

2. Dr. A. Bijikumari Amma.
Joint Commissioner (A & I),
Office of the Commissioner of Commercial Taxes, Thiruvananthapuram.

3. N. Thulaseedharan Pillai.
Joint Commissioner (General),
Office of the Commissioner of Commercial Taxes, Thiruvananthapuram.

Sub :- KVAT Act, 2003 – Clarification U/s 94 – Rate of tax of lamp oil – Orders issued.

Read:- Application dtd. 12-04-13 from M/s. KOG-KTV Food Products (India) Pvt. Ltd.

ORDER No.C3/11481/13/CT DATED 03/07/2017

1. M/s. KOG-KTV Food Products (India) Pvt. Ltd. has preferred an application U/s. 94 of the Kerala Value Added Tax Act, 2003, seeking clarification as to the rate of tax of lamp oil.

2. The applicant has submitted that he intends to market 'lamp oil' through the branches in Kerala. Lamp oil is produced by adding 0.01% by weight of sugandha draviyas to edible palm oil, in order to give a pleasant odour to palm oil, which is manufactured in the applicant's factory in Tuticorin. The use of lamp oil is for lighting lamps at home, temple and performing religious rituals.

3. The applicant would contend that the item 'lamp oil', which is obtained by adding 0.01% of sugandha draviyas to palm oil, which is an edible oil falling under entry no. 38(4) of the third schedule of the KVAT Act, is not a new product other than palm oil since 99.99% of lamp oil is palm oil. When 0.01% of sugandha draviyas is added to palm oil, edible oil becomes inedible and 'inedible palm' oil is specifically included under Schedule III of the commodity list. The applicant would further contend that when the Commercial Taxes Department itself has classified 'inedible palm oil' as an item coming under the III schedule as per its commodity list, it can be

said that 'lamp oil' which is inedible palm oil falls fairly and squarely under the III schedule of the Act taxable @5%. The word 'inedible' means not to fit or suitable for eating and some of its synonyms are uneatable, unconsumable etc. When sugandha draviyas are added to palm oil it becomes inedible and even though it is called lamp oil on the basis of its use, it comes under the generic term 'inedible palm oil'.

4. The applicant would also contend that lamp oil is never marketed as perfumery. The applicant placing his reliance on the decision in **Union of India Vs. Sonic Electro Chem P Ltd** [2002 (145) ELT 274 (SC)] would contend that applying the principle laid down therein i.e. commercial identity of the article as known to the market is relevant for the purpose of classification, lamp oil is not to be treated as odoriferous preparation in the absence of such recognition by the trade.

5. The applicant would then contend that in **Commissioner Vs. S.N. Products** [2006 (200) ELT 342 (Tri)] it was held that coconut oil with the addition of Vitamin E is classifiable under Heading 15.03. In **Commissioner Vs. Consumer Plastics P Ltd.** [2006 (194) ELT 214 (Tri)] it was held that epoxidized vegetable oil used in plastic industry was classifiable under Chapter 15 of the Central Excise Tariff. The applicant contends that these two case laws make it clear that to get classified in Chapter 15 of the Central Excise Tariff, the oil need not be edible one.

6. The applicant would further contend that the primary and essential purpose of the product is burning the lamp. The applicant placing reliance on Rule 3(b) of the General Rules of Interpretation states that where the goods are a mixture of different substances, the classification has to be determined on the basis of the essential character i.e. the substances which gives the essential character of the product. The classification has to be made in the Heading which is suitable for the material which gives the essential character for the product. Applying this rule, the essential character is given by the oil and not by the perfumery. Hence, the applicant would contend that the lamp oil is classifiable under Heading 1511.90.20 since it is made of palm oil. The applicant has also submitted copy of their Central Excise Return wherein the product has been included in CETSH No. 15119020 with the Description Vegetable Lamp Oil.

7. The applicant would further contend that the **Hon'ble Supreme Court of India in Collector of Central Excise, Shilling v/s. Wood Craft Products Ltd**.

has held that resort can be made to a residuary entry only when by liberal construction the specific entry cannot cover the goods in question. Again the **Hon'ble Supreme Court in State of Maharashtra v/s. Bradma of India Ltd.** has held that the general principle is that specific entry could override a general entry. **The Hon'ble Supreme Court in State of Karnataka and Others v/s. Balaji Computers and Others** has held that as per the rule of 'Contemporanea Exposito' the construction adopted by administrative authorities be given much weight and highly persuasive.

8. The applicant has requested to clarify the rate of tax of the above commodity.

9. The authorised representative of the applicant was heard in the matter and the contentions raised were examined.

10. The applicant has sought the tax rate of 'lamp oil' which is produced by adding 0.01% by weight of sugandha draviyas to edible palm oil which is used for lighting lamps at home, temple, and for performing religious rituals. When sugandha draviyas are added to edible palm oil, the form of the latter changes from 'edible' to 'non-edible'. However, in this process no new product is manufactured.

11. As per guideline vi (25) of the 'Rules of Interpretation of Schedules', mentioned in the appendix to the KVAT Act, *Entry 38 of the 3rd schedule includes only the edible grade of vegetable oils. Non-edible grade of vegetable oils would come under entry 138 of the 3rd schedule.*

12. In the light of the above, it is clarified that 'lamp oil' would come under entry 138(4) of the third schedule to the KVAT Act bearing the HSN code 1511.90.90, and, hence, would be taxable at 5%.

The issues raised above are clarified accordingly.

T.K. Ziavudeen	**Dr. A. Bijikumari Amma**	**N. Thulaseedharan Pillai**
Joint Commissioner (Law)	**Joint Commissioner (A&I)**	**Joint Commissioner (General)**
O/o CCT	**O/o CCT**	**O/o CCT**

To

M/s. KOG-KTV Food Products (India) Pvt. Ltd.,
C-85, 2nd Main Road, SIPCOT Complex,
Tuticorin-628 008

DEPARTMENT OF COMMERCIAL TAXES, KERALA
PROCEEDINGS OF THE AUTHORITY FOR CLARIFICATION
U/s.94 OF THE KERALA VALUE ADDED TAX ACT, 2003.

Members present are:

1. T.K. Ziavudeen.
Joint Commissioner (Law),
Office of the Commissioner of Commercial Taxes, Thiruvananthapuram.

2. Dr. A. Bijikumari Amma.
Joint Commissioner (A & I),
Office of the Commissioner of Commercial Taxes, Thiruvananthapuram.

3. N. Thulaseedharan Pillai.
Joint Commissioner (General),
Office of the Commissioner of Commercial Taxes, Thiruvananthapuram.

Sub : KVAT Act, 2003 – Clarification U/s 94 – Tax liability on rent received for mounting flex boards on hoardings and amount received for undertaking wall paintings on walls taken on lease – Judgment of Hon'ble High Court of Kerala - Clarification order withdrawn - Orders issued.

Read : 1. Application dtd. 10.02.2014 from M/s. Drisya Advertising, Kochi.
2. This Office Order of even No. dtd. 09.11.2015.
3. Judgment of the Hon'ble High Court in O.T.Rev. No. 103 of 2012 dated 31.07.2015.

ORDER No.C3/5401/14/CT DATED 03/07/2017

1. M/s. Drisya Advertising, Kochi vide paper 1st read above had preferred an application U/s 94 of the Kerala Value Added Tax Act, 2003 seeking clarification as to the tax liability on rent received for mounting flex boards on hoardings and amount received for undertaking wall paintings on walls taken on lease. Accordingly, this Authority vide order read as paper 2nd above clarified that there is no taxable event under 'transfer of right to use' in respect of the rent received for mounting flex boards of advertisements on the hoardings erected by the applicant.

2. But, Hon'ble High Court of Kerala in an identical case, **M/s Delta Communications v/s. State of Kerala**, OTR No. 103/2012 dtd. 31-07-2015 wherein the dealer had acquired land on lease in various places in the State of Kerala for displaying the advertisements in hoardings, held that where under a contract or work order hoarding is transferred to a lessee for a specified period enabling the lessee to display the advertisement works on it according to the

wishes and imaginations of the lessee and therefore the assessee is totally excluded from the realm of the work that is carried out by the lessee in the hoardings let out and hence there is definitely a transfer of right to use of goods by transferring the hoardings to the lessee by the revision petitioner.

3. Going by the above decision rendered by the Hon'ble High Court of Kerala, the applicant is liable to tax under the Act, and therefore, keeping in view the principles laid down in the judgment referred to above, the clarification order read as paper 2nd above is hereby withdrawn.

T.K. Ziavudeen	**Dr. A. Bijikumari Amma**	**N. Thulaseedharan Pillai**
Joint Commissioner (Law) (General)	**Joint Commissioner (A&I)**	**Joint Commissioner**
O/o CCT	**O/o CCT**	**O/o CCT**

To

M/s. Rejith & Maju,
Chartered Accountants,
36/1118, Mohammed Kunju Vaidyar Lane,
Judges Avenue, Kaloor, Kochi - 17

DEPARTMENT OF COMMERCIAL TAXES, KERALA
PROCEEDINGS OF THE AUTHORITY FOR CLARIFICATION U/s.94 OF THE KERALA VALUE ADDED TAX ACT, 2003.

Members present are:

1. T.K. Ziavudeen.
Joint Commissioner (Law),
Office of the Commissioner of Commercial Taxes, Thiruvananthapuram.

2. Dr. A. Bijikumari Amma.
Joint Commissioner (A & I),
Office of the Commissioner of Commercial Taxes, Thiruvananthapuram.

3. N. Thulaseedharan Pillai.
Joint Commissioner (General),
Office of the Commissioner of Commercial Taxes, Thiruvananthapuram.

Sub :- KVAT Act, 2003 – Clarification U/s 94 – Rate of tax on Kezrin Soap - Orders issued.

Read:- Application dtd. 27-07-16 from M/s. Rhine Biogenics Pvt. Ltd., Palakkad

ORDER No.CT/4337/2016-C3 DATED 04/07/2017

1. M/s. Rhine Biogenics Pvt. Ltd., Palakkad has preferred an application U/s 94 of the Kerala Value Added Tax Act, 2003 seeking clarification as to rate of tax on Kezrin soap.

2. The applicant is a pharmaceutical company engaged in trading of medicines and non-medicines on the rolls of the Assistant Commissioner, Special Circle, Palakkad.

3. The applicant would submit that 'Kezrin Soap' contains the medicine Ketaconazole-2% which is manufactured as per Indian Pharmacopeia and can be sold only on medical prescription of a Registered Medicinal Practitioner. Kezrin Soap contains a blend of vegetables and mineral tars often found effective in Eczema, Psoriasis and seborrhea. The product Ketaconazole-2% comes within the scope of Pharmaceutical products falling under entry 3004 of Central Excise Tariff Act and Entry 36 of the Third schedule to the KVAT Act taxable at the rate of 5%. Accordingly, the applicant is selling the same collecting tax at 5% on MRP and is raising invoice in Form 8H as other medicine.

4. The applicant would further submit that the product is manufactured by M/s. BCL Pharma, Himachal Pradesh in accordance with the norms of Drugs and

Cosmetics Act, 1940. The applicant has produced copies of Drug License obtained by M/s. BCL Pharma in Form 25 and declaration by M/s. BCL Pharma asserting the product is to be treated as a medicament. Even though the product is in the mode of soap, it is a medicine recommended by Doctors to cure fungal skin infections and cannot be used as common bath soap. A **warning** that the product can be sold **only** on the prescription of a Medical Practitioner is printed in the carton. The product is billed only to those dealers having valid drug license and can only be sold through medical shops.

5. The applicant placed his reliance on the judgment of the Hon'ble Supreme Court in the case of **Commissioner of Central Excise, Hyderabad vs. M/s. Sarvotham Care Ltd.** wherein the Apex Court classified 'Ketaconazole Shampoo' containing 2% Ketaconazole as a medicament.

6. The applicant has referred to the decision of High Court of Gauhati in **Emami Ltd. and another vs. State of Assam and another**, wherein it has been held as under:

> *"We have also found that when a product in common parlance and on user perception is found to be a drug, the same needs to be concluded as drug although it can be used in ancillary measure as cosmetic product as well. The decisions referred to above make such position clear.*
> *Coming back to our case, we have found that products which are involved in the proceedings before us are basically treated as drugs and medicines although they have ancillary use as cosmetics and toilet products, and as such, the respondent authorities herein were not right in treating those articles as cosmetics and toilet products for the purpose of levy of tax at 12.5% in terms of entry No. 1 of the Fifth schedule to the Act of 2003. Rather, tax on those products was to be levied at per cent in terms of entry No. 21 of the Fourth Schedule to the aforesaid Act."*
> *In the result, the notification / letters / orders classification in so far they relate to the impugned goods, so specified in the writ petitions aforesaid are hereby quashed and set aside."*

7. The applicant further referred to the definition of the words "cosmetic" and "drug" as defined in the Drugs and Cosmetics Act, 1940, which was considered by the Apex Court while arriving at the aforementioned judgment.

> *A 'cosmetic' means any article intended to be rubbed, poured, sprinkled or sprayed on, or introduced into, or otherwise applied to, the human body or part thereof for cleansing, beautifying, promoting attractiveness or altering the appearance and includes any article intended for use as a component of cosmetic*.
> *A 'drug' includes all medicines for internal or external use of human beings or animals and all substances intended to be used for or in the diagnosis, treatment, mitigation or prevention of any disease or disorder in human beings or animal including preparations applied on human body for the purpose of repelling insects.*

8. The applicant argued that the product in question, 'kezrin soap' is not intended for cleansing, beautifying, promoting attractiveness or altering the

appearance. On the other hand it is intended to cure certain diseases as mentioned supra.

9. The applicant has requested to clarify the rate of tax of the above commodity.

10. The applicant was heard in the matter and the contentions raised were examined.

11. The request of the applicant is to clarify the rate of tax of 'Kezrin soap'. 'Kezrin' is, undoubtedly, a medicated soap. The Kerala Value Added Tax Act Schedule Entries to be examined in this regard are Entry 36 (8) and Entry 36 (27).

36	***Drugs, Medicines and Bulk Drugs including Ayurvedic, Unani and Homeopathic medicine but excluding mosquito repellants and those specifically mentioned in the First Schedule.***	
	(8) Medicaments (excluding goods of HSN heading nos. 3002, 3005, or 3006)consisting of mixed or unmixed products for therapeutic or prophylactic uses, put up in measured doses (including those in the form of transdermal administration systems) or in forms or packings for retail sale	
	(a) containing pencillins or derivatives thereof, with a penicillanic acid structure, or streptomycins or their derivatives	*3004.10*
	(b) containing other antibiotics: cephalosporins and their derivatives	*3004.20*
	(c) containing hormones or other products of HSN heading No. 2937 but not containing antibiotics other than insulin injection	*3004.31*
	(d) containing corticosteroid hormones, their derivatives and structural analogues	*3004.32.00*
	(e) Pituitary hormones; pednisolone; dexamethasone; danazol; other progestogen and oestogen group hormones	*3004.39*
	(f) containing alkaloids or derivatives thereof but not containing hormones, other products of HSN heading No. 2937 or antibiotics	*3004.40*
	(g) Other medicaments containing vitamins or other products of HSN heading No.2936	*3004.50*
	(h) Other	
	(i) Medicaments of Ayurvedic system	*3004.90.11*
	(ii) Medicaments of Unani system	*3004.90.12*
	(iii) Medicaments of Siddha	*3004.90.13*
	(iv) Medicaments of Homoeopathic system	*3004.90.14*
	(v) Medicaments of Bio-chemic system	*3004.90.15*
	(vi) Medicaments other than those given in sub-entries (I) to (v)	*3004.90*
	(27) Ayurvedic cosmetics containing added medicaments and manufactured under drug license granted under the Drugs and Cosmetics Act, 1940 (Central Act 23 of 1940)	*****

12. But, notes 1(d) and (e) of Chapter 30 of the Customs Tariff Act viz. Pharmaceutical products, reads:

1. This Chapter does not cover:

(d) preparations of headings 3303 to 3307, even if they have therapeutic or prophylactic properties;
(e) soap or other products of heading 3401 containing added medicaments;

Moreover, item vi(23) of the Rules of interpretation specifically state that *'Entry 36 in Third Schedule does not include food or beverages such as dietetic, diabetic or fortified foods, food supplements, tonic beverages, aqueous distillates or aqueous solutions of essential oils suitable for medicinal use,* ***soaps or other products containing added medicaments,*** *and blood albumin not prepared for therapeutic or prophylactic uses*.

13. The Customs Tariff Act Item 3401 reads as follows:

3401		***SOAP; ORGANIC SURFACE-ACTIVE PRODUCTS AND PREPARATIONS FOR USE AS SOAP, IN THE FORM OF BARS, CAKES, MOULDED PIECES OR SHAPES, WHETHER OR NOT CONTAINING SOAP; ORGANIC SURFACE-ACTIVE PRODUCTS AND PREPARATIONS FOR WASHING THE SKIN, IN THE FORM OF LIQUID OR CREAM AND PUT UP FOR RETAIL SALE, WHETHER OR NOT CONTAINING SOAP; PAPER, WADDING, FELT AND NONWOVENS, IMPREGNATED, COATED OR COVERED WITH SOAP OR DETERGENT***
		Soap and organic surface-active products and preparations, in the form of bars, cakes, moulded pieces or shapes, and paper, wadding, felt and nonwovens, impregnated, coated or covered with soap or detergent :
3401 11	--	*For toilet use (including medicated products):*
3401 11 10	--	*Medicated toilet soaps*
3401 11 20	--	*Shaving soaps other than shaving cream*
3401 11 90	--	*Other*
3401 19	--	*Other:*
	---	*Bars and blocks of not less than 500 gm in weight:*
3401 19 11	--	*Industrial soap*
3401 19 19	--	*Other*
3401 19 20	--	*Flakes, chips and powder*
3401 19 30	--	*Tablets and cakes*
	---	*Household and laundry soaps not elsewhere specified or included :*
3401 19 41	--	*Household soaps*
3401 19 42	--	*Laundry soaps*
3401 19 90	--	*Other*
3401 20 00	--	*Soap in other forms*
3401 30	-	*Organic surface-active products and preparations for washing the skin, in the form of liquid or cream and put up for retail sale, whether or not containing soap :*
	---	*For toilet use (including medicated products):*
3401 30 11	--	*Medicated toilet soaps*
3401 30 12	--	*Shaving cream and shaving gel*

3401 30 19 -- Other

3401 30 90 -- Other

The corresponding entry in the Kerala Value Added Tax Act is Entry 27(1)(a) of the SRO No. 82/2006 which reads as under:

27 Detergents whether cake, liquid or powder, toilet soap, washing soap, laundry brighteners, abir, blue, stain busters, stain removers and all kinds of cleaning powder and liquids including floor and toilet cleaning whether medicated or not

(1) Soap and organic surface active products and preparations in the form of bars, cakes, moulded pieces of shapes and paper, wadding , felt and non wovens, impregnated , coated or covered with soap or detergents

(a) Medicated toilet soap 3401.11.10

From the above, it is clear that 'medicated toilet soap' is covered under Entry 27(1)(a) of the SRO No. 82/2006, bearing HSN Code 3401.11.10.

14. In the light of the above, it is hereby clarified that the commodity 'Kezrin soap' would come under the entry 27(1)(a) of the SRO No. 82/2006 and would be taxable @ 14.5%.

The issues raised above are clarified accordingly.

T.K. Ziavudeen
Joint Commissioner (Law) (General)
O/o CCT

Dr. A. Bijikumari Amma
Joint Commissioner (A&I)
O/o CCT

N. Thulaseedharan Pillai
Joint Commissioner
O/o CCT

To

CA B.Mohan,
Chartered Accountant,
M/s. K. Venkatachalam Aiyer & Co.,
Chartered Accountants, Vipinam,
Door No. 15/251 (17), Sivankovil Street,
Tharakkad Village, Palakkad – 678 001

DEPARTMENT OF COMMERCIAL TAXES, KERALA
PROCEEDINGS OF THE AUTHORITY FOR CLARIFICATION U/s.94 OF THE KERALA VALUE ADDED TAX ACT, 2003.

Members present are:

1. T.K. Ziavudeen.
Joint Commissioner (Law),
Office of the Commissioner of Commercial Taxes, Thiruvananthapuram.

2. Dr. A. Bijikumari Amma.
Joint Commissioner (A & I),
Office of the Commissioner of Commercial Taxes, Thiruvananthapuram.

3. N. Thulaseedharan Pillai.
Joint Commissioner (General),
Office of the Commissioner of Commercial Taxes, Thiruvananthapuram.

Sub: KVAT Act, 2003 – Clarification U/s 94 – Rate of tax of Red Bull Energy Drink – Orders issued.

Read: 1. Application dtd. 18-11-16 from M/s. Red Bull India Pvt. Ltd., Aluva.
2. This office order dtd. 25.01.16.
3. Judgment of Hon'ble High Court in WP(C) 3579/2016 dtd. 02.02.16.
4. Judgment of Hon'ble High Court in RP. 129/2016 dtd. 31.05.16
5. Judgment of Hon'ble High Court in WA 1644/2016 dtd. 31.10.16.

ORDER No.C3/39254/15/CT DATED 11/07/2017.

1. M/s. Red Bull India Pvt. Ltd., Aluva, who is engaged in nationwide marketing and distribution of the 'Red Bull' brand of Energy Drinks, preferred an application U/s 94 of the Kerala Value Added Tax Act, 2003 seeking clarification as to the rate of tax of the product 'Red Bull Energy Drink'. Since the assessing authority concerned had already passed order on the subject matter, the application for clarification was not entertainable u/s. 94 of the Act and hence the Authority for Clarification declined the said application vide 2nd paper read above. Aggrieved by this, the applicant filed Writ Petition before the Hon'ble High Court of Kerala and the Hon'ble High Court vide its judgment read 3rd paper above quashed the clarification order and directed to pass fresh orders after hearing the petitioner within a period of one month. Further, the review petition and writ appeal filed by the Department were also dismissed by the court vide judgement read as paper 4 and 5 above.

2. Accordingly the matter was re-heard by the competent authority U/s 94 of the Kerala Value Added Tax Act, 2003.

3. The applicant has argued that the Registration certificate of the applicant very clearly sets out that the registration is granted to the applicant as a 'health drink'. Thus at the time of registration itself it was understood by the concerned authority that the product in question is a health drink and not an aerated branded soft drink.

4. The applicant further contends that the ingredients of the product 'Red Bull' are widely contrasted from a soft drink and instead are in the nature of an energy drink, being a nourishment food and food supplement. The primary ingredients of the product are as under;

a) Caffeine	*A stimulant which improves mental and physical performance*
b) Taurine	*An amino acid which is a constituent of the human body.*
c) Glucurono Actone	*A carbohydrate naturally occurring in the human body. It promotes a sense of well-being.*
d) Inositol	*A Vitamin B complex which acts as a building block of cell membrane*
e) B Vitamins	*These vitamins play a role in metabolism*
f) Sucrose and Glucose	*These sugars are source of energy for the body*

5. The applicant has submitted that it is on account of these ingredients that increases performance, concentration, reaction speed and makes one feel more energetic and promotes the feeling of well-being. These aspects are missing in soft drinks. Other distinction with soft drink is as under:

Sl. No.	Aerated/Carbonated Beverages	Red Bull Energy Drink
1	In common parlance, the product is treated as non-alcoholic soft drink/beverage	In common parlance the product is treated by the person as an 'Energy Drink'.
2	Basic ingredients are water, sugar, vitamins, CO_2, may be concentrated fruit pulp, colours and flavours etc.	Water, sucrose, glucose, acidity regulator, acidulants, taurine, caffeine, glucoronolactone, inositol, vitamins, permitted nature colour or artificial flavours. Caffeine is added to energy drinks ostensibly to increase mental performance.
3	In carbonated beverages CO_2 is used for taste and appeal due its fizz	In Red Bull energy drink, CO_2 is a preservative and used for extending the shelf life of drink. Carbonation acts as a preservative against yeast, mould(fungus) and bacteria
4	Generally the maximum life of the product is 6 months from the date of manufacture	The maximum life is 24 months from the date of manufacturing
5	There is no warning/restriction on the usage of soft drinks. These beverages can be consumed by person of any age	There is restriction on use of the product – not to be used by children, pregnant or lactating mothers and persons sensitive to high doses of caffeine. It is also recommended in the warning that not more than two cans should be consumed per day
6	Under the provisions of FSSAI the product comes under the heading Carbonated water Caffeine level allowed in carbonated drinks cannot exceed 145ppm	Under the provisions of FSSAI the Energy Drink comes under the heading 'Caffeinated Beverages'. Caffeine level allowed between 145 ppm and 320 ppm. Red Bull energy drink contains 320 ppm.
7	Excise/Customs classification –	Excise / Customs classification – Red Bull

	Aerated & carbonated beverages are classified under Tariff item 2202 1010 as aerated waters	Energy Drink is non-alcoholic drink classified under Tariff item 2202 9090 as others.

6. The applicant has referred to the Regulations issued by the Food Safety and Standards Authority of India (FSSAI), Ministry of Health and Family Welfare, Government of India. Vide Gazette Notification No. P. 15025/93/2011-PFA/FSSAI dtd. 06.02.16, the standards which were issued for discussion in 2013 have been finalized and notified.

- These Regulations differentiate between "Beverages Non-Alcoholic-Carbonated" (covered in Regulation 2.10.6(1)) from "Caffeinated Beverages" (covered in Regulation 2.10.6(2)).
- The FSSAI Regulations clearly state that the Caffeinated Beverages have to carry a warning regarding the maximum usage per day etc.
- These Regulations further state that it is mandatory to state on the label that it is "not recommended for children, pregnant or lactating women, persons sensitive to caffeine".

7. The applicant has further argued that the aforesaid FSSAI Regulations clearly reveal that there is wide difference in soft drinks from energy drinks with high caffeine content, such as in the case of their product Red Bull. The FSSAI itself issued a Certificate dtd. 01.06.12 to the applicant wherein it was directed that the applicant is required to follow these requirements. The applicant then contended that the product in question is recognized by the regulating authority of the Government of India also as different from soft drink and as energy drink with high caffeine content.

8. The applicant further submits that the Customs Department contended that the product Red Bull is covered under 2202 10 10 being aerated water. But the Commissioner (Appeals) of the Customs Department endorsed the classification of 2202 90 90. The appeal filed by the Department against this order was dismissed by the Hon'ble Customs, Excise and Service Tax Appellate Tribunal(CESTAT). The observation of the Hon'ble CESTAT was as under:

> *As this product in question is having caffeine contents, glucose and vitamins, etc. therefore, the said product cannot be classified under 2202.10.10 as the scope of that classification is limited ie., mineral waters and aerated waters, containing added sugar or other sweetening matter or flavoured. Moreover, the Harmonized Tariff Schedule classified the product in question as 2202.90.90. The FSSAI also held that the said product is caffeinated beverage and not mineral waters and aerated waters. Moreover, the impugned product "Energy Drink" is not recommended for children, pregnant or lactating mothers and persons sensitive to high doses of caffeine. Therefore, it is held that this product contains of caffeinated beverage, mineral water and aerated waters therefore, the appropriate classification is 2202.90.90.*

9. The applicant has also argued that even under common parlance, the product in question is not soft drink but is energy drink/health drink due to following reasons:

- Red Bull Energy Drink is a functional beverage specifically developed for those who want to be physically and mentally active. Energy Drink increases performance, concentration and reaction speed; improves vigilance, makes one feel more energetic.
- Red Bull has a clear endorsed warning on every can that it is not recommended for children, pregnant or lactating mothers and persons sensitive to high doses of caffeine and not more than 2 cans can be consumed in a day. These restrictions are not placed on Aerated branded soft drinks which can normally be consumed even in large amounts without causing any harm. Also, the price of the Red Bull Energy Drink is more than three times compared to a normal soft drinks.
- A trader will never sell energy drink to a buyer seeking soft drinks such as cola, lemonade. Similarly, a trader will not provide soft drinks such as cola, lemonade to a buyer who need energy drink. Applying the same analogy, it is unlikely that a consumer will ask for Energy drink when he wants a soft drink. When one talks about Aerated Branded Soft Drinks, products such as Red Bull Energy Drink do not come up to one's mind.

10. The authorised representative of the applicant was heard in the matter and the contentions raised were examined.

11. Admittedly and also based on evidence, 'Red Bull' is a caffeinated beverage, which is obviously non-alcoholic. From the facts of the case, the proprietary food in question is certainly not a soft drink. Due to its restrictive use, 'Red Bull' cannot be classified as a health drink, as understood in common parlance. Hence, under the KVAT Act, the entry as per SRO No. 82/2006, which would most appropriately apply to the said product, is 71(5) which reads as under:

71	***Non-alcoholic beverages and their powders, concentrates and tablets in any form including;***	
	(5)	similar other products not specifically mentioned under any other entry in this list or in any other Schedules

12. As such, it is hereby clarified that the commodity 'Red Bull Energy Drink' would be exigible to VAT at the rate of 14.5% by virtue of Entry 71(5) of SRO No. 82/2006 to the Kerala Value Added Tax Act, 2003.

The issues raised above are clarified accordingly.

T.K. Ziavudeen	**Dr. A. Bijikumari Amma**	**N. Thulaseedharan Pillai**
Joint Commissioner (Law)	**Joint Commissioner (A&I)**	**Joint Commissioner (General)**
O/o CCT	**O/o CCT**	**O/o CCT**

To

Sri. Anil D. Nair,
39/2661, 2nd Floor,
Panthiyil Towers, Warriam Road, Kochi – 682 016

DEPARTMENT OF COMMERCIAL TAXES, KERALA
PROCEEDINGS OF THE AUTHORITY FOR CLARIFICATION
U/s.94 OF THE KERALA VALUE ADDED TAX ACT, 2003.

Members present are:

1. T.K. Ziavudeen.
Joint Commissioner (Law),
Office of the Commissioner of Commercial Taxes, Thiruvananthapuram.

2. Dr. A. Bijikumari Amma.
Joint Commissioner (A & I),
Office of the Commissioner of Commercial Taxes, Thiruvananthapuram.

3. N. Thulaseedharan Pillai.
Joint Commissioner (General),
Office of the Commissioner of Commercial Taxes, Thiruvananthapuram.

Sub :- KVAT Act, 2003 – Clarification U/s 94 – whether the applicant has to pay tax on MRP on local sales - Orders issued.

Read:- Application dtd. 17-09-15 from Smt. Jabeen, Crescent Party Sales, Kochi

ORDER No.C3/32848/15/CT DATED 01/07/2017

1. Smt. Jabeen, Crescent Party Sales, Kochi has preferred an application U/s 94 of the Kerala Value Added Tax Act, 2003, seeking clarification as to whether the applicant is eligible in paying tax on MRP on her local sales.

2. The applicant is a proprietary business concern having registration in Kerala and is a dealer in house hold utensils, casseroles, containers and exclusively purchasing goods from M/s. Tupperware [India] Pvt. Ltd., Haryana. The applicant is selling goods within the State, to end customers as well as to agents who sells goods to end customers through home delivery. The applicant has submitted that M/s. Tupperware [India] Pvt. Ltd., Haryana is a Multi-level marketing entity.

3. The request of the applicant is to clarify -

a) whether the applicant has to pay tax on MRP on her local sales
b) whether her agents who purchases goods from her have tax liability

4. The applicant has requested to issue clarification based on the statement of facts submitted by her.

5. The issue was examined. As per sec. 2(xxviiB) of KVAT Act, 2003 multi-level marketing entity *means a company registered under the Companies Act, 2013 (Central Act 18 of 2013) or any partnership firm registered under the Partnership Act, 1932 (Central Act IX of 1932) or under the Limited Liability Partnership Act, 2008 (Central Act 6 of 2009) engaged in multi-level marketing".* As per guidelines issued by the Government of Kerala, conditions for permissible Direct Selling are as follows:

(i) Every Direct Selling Entity operating within the State should have
(a) Registered under the KGST Act, 1963/KVAT Act, 2003, Income Tax Act;
(b) Licenses as may be required as per the Laws of the State/Centre;
(c) The Partnership deed or Memorandum of Association should clearly state their nature of business;
(ii) The Direct Selling Entity should pay sales incentive to Direct Sellers at the agreed rate within the agreed period;
(iii) The Direct Selling Entity should have an official website which should contain the names and identification numbers of their authorised Direct sellers and provisions for registering complaints by the consumers;
(iv) The Direct Selling Entity should have a consumer grievance cell that should ensure redressal of consumer grievances within seven days from the date of making such complaints.

6. In the present case, even though M/s. Tupperware is a Multi-level Marketing Company as claimed by the applicant, the same is not registered under the KVAT Act. And the applicant being a proprietary concern, it cannot be considered as a multi-level marketing entity as defined u/s. 2(xxviiB) of the KVAT Act. From the statement of facts mentioned in the application, it is not clear as to the manner in which the applicant effects sale to her end customers.

7. In view of the above facts, it is hereby clarified that since the constitution of the business entity is not that of a company, or a partnership firm, the applicant cannot pay tax on MRP. Instead, the applicant needs to pay tax on the actual selling price. Further, persons who purchase goods from the applicant cannot be treated as her agents. So, such persons will incur tax liability if the total turnover for a year is not less than ten lakh rupees.

The issues raised above are clarified accordingly.

T.K. Ziavudeen **Joint Commissioner (Law)** **O/o CCT**	**Dr. A. Bijikumari Amma** **Joint Commissioner (A&I)** **O/o CCT**	**N. Thulaseedharan Pillai** **Joint Commissioner (General)** **O/o CCT**

To

M/s. Crescent Party Sales,
Valiyaveettil, Nice Gardens,
Near P J Antony Ground,
P J Antony Road, Pachalam,
Kochi-682 012

DEPARTMENT OF COMMERCIAL TAXES, KERALA
PROCEEDINGS OF THE AUTHORITY FOR CLARIFICATION
U/s.94 OF THE KERALA VALUE ADDED TAX ACT, 2003.

Members present are:

1. T.K. Ziavudeen.
Joint Commissioner (Law),
Office of the Commissioner of Commercial Taxes, Thiruvananthapuram.

2. Dr. A. Bijikumari Amma.
Joint Commissioner (A & I),
Office of the Commissioner of Commercial Taxes, Thiruvananthapuram.

3. N. Thulaseedharan Pillai.
Joint Commissioner (General),
Office of the Commissioner of Commercial Taxes, Thiruvananthapuram.

Sub :- KVAT Act, 2003 – Clarification U/s 94 – applicability of reverse tax on purchase returns - Orders issued.

Read:- Application dtd. 06-02-14 from M/s. Whirlpool of India Ltd., Kalamassery.

ORDER No.C3/5228/14/CT DATED 12/07/2017

1. M/s. Whirlpool of India Ltd., South Kalamassery has preferred an application U/s. 94 of the Kerala Value Added Tax Act, 2003 seeking clarification as to whether reverse tax is applicable when a registered dealer returns goods to the seller after the expiry of 90 days from the date of purchase.

2. The applicant is a multi-national company having head office and manufacturing unit at Faridabad, producing home appliances such as washing machines, air conditioner, refrigerators, microwave ovens, home UPS etc. with branch office at South Kalamassery with registration under the KVAT Act, 2003 and CST Act, 1956.

3. The applicant has argued that if reverse tax is applicable on account of purchase return after 90 days in the case of the dealer who returns the goods, there is double taxation since the department will get tax twice on the same transaction which is against the statute and the constitution.

4. The applicant has requested to clarify whether reverse tax is applicable when a registered dealer returns goods to the seller after the expiry of 90 days from the date of purchase.

5. The applicant was heard in the matter and the contentions raised were examined.

6. As per the definition of reverse tax in section 2(xlii) of the KVAT Act, 2003 reverse tax means *that portion of input tax of the goods for which credit has been availed but such goods remain unsold at the closure of business or are used subsequently for any purpose other than resale or manufacture of taxable goods or execution of works contract or use as containers or packing materials of taxable goods within the State.*

7. In view of the above, reverse tax is applicable in circumstances which are specifically mentioned in sec. 2(xlii) of the KVAT Act, 2003.

The issue raised is clarified accordingly.

T.K. Ziavudeen **Joint Commissioner (Law)** **O/o CCT**	**Dr. A. Bijikumari Amma** **Joint Commissioner (A&I)** **O/o CCT**	**N. Thulaseedharan Pillai** **Joint Commissioner (General)** **O/o CCT**

To

CA. P.J.Johney,
Johney & Co., Chartered Accoutants,
J & Co Chambers, Manimala Road,
Edappally, Kochi-24

DEPARTMENT OF COMMERCIAL TAXES, KERALA
PROCEEDINGS OF THE AUTHORITY FOR CLARIFICATION U/s.94 OF THE KERALA VALUE ADDED TAX ACT, 2003.

Members present are:

1. T.K. Ziavudeen.
Joint Commissioner (Law),
Office of the Commissioner of Commercial Taxes, Thiruvananthapuram.

2. Dr. A. Bijikumari Amma.
Joint Commissioner (A & I),
Office of the Commissioner of Commercial Taxes, Thiruvananthapuram.

3. N. Thulaseedharan Pillai.
Joint Commissioner (General),
Office of the Commissioner of Commercial Taxes, Thiruvananthapuram.

Sub :- KVAT Act, 2003 – Clarification U/s 94 – Rate of packing materials made out of plastic – Orders issued.

Read :- 1. Clarification Order No.C3/12914/13/CT dtd.19.04.16
2. Judgment of the Hon'ble High Court in WP(C) No. 23390 of 2016 dtd. 13-07-2016
3. Application dtd. 05-07-16 from M/s. Talash Plastopacks.

ORDER No.C3/22114/16/CT DATED 08/08/2017

1. M/s. Talash Plastopacks, Pappinisseri had preferred an application u/s. 94 of the Kerala Value Added Tax Act, 2003, seeking clarification on the rate of tax of the commodities disposable plastic tumblers, trays, containers etc.

2. Accordingly, as per the Order read 1st paper above it was clarified that *all disposable plastic cups and tumblers irrespective of its size, capacity, shape etc. would be taxable at the rate of 20% by virtue of serial No. 3A of the Table to clause (a) of Section 6(1) of the Kerala Value Added Tax Act w.e.f. 01/04/13. Styrofoam (Thermocol) cups and plates would be taxable at the rate of 20% by virtue of serial No. 3A of the Table to clause (a) of Section 6(1) w.e.f. 1/4/15. Paper cups are exempt from tax by virtue of Entry 35A of the First Schedule to the Act w.e.f. 1/4/14. Thick plastic trays which are used as packing materials for electronic items would be taxable at the rate of 5% by virtue of Entry 174 to List A attached to Third Schedule to the Act.*

3. Aggrieved by the order, the applicant preferred WP(C) No. 23390 of 2016 before the Hon'ble High Court of Kerala. The Hon'ble Court vide its judgment dtd. 13-07-2016 directed to examine the above clarification order and pass orders with reference to the application read 3rd paper above. As per the direction of the Hon'ble High Court the applicant was heard afresh.

4. The applicant would submit that they are the manufacturer and dealer of disposable plates, cups, tumblers, containers, trays, bowls etc made of plastics falling under Schedule 33 (2), 137 (12), 174 (1), (5), (8), (9).

5. The applicant would contend that as per Finance Act 2013 **'Disposable plates, cups and leaves made of plastic'** were included under Table 3A to clause A of section 6(1) of the KVAT Act 2003 taxable at 20% and they have no dispute with regard to rate of tax on the aforesaid items made of plastic, as items are specific. They would also submit that over and above the afore said items, they are selling **Containers, trays, bowls** etc which would come under List A of 3rd schedule 'industrial inputs and packing materials' in Entry 174 – '*packing materials of all kinds, articles for conveyance or packing of goods of plastics, wood, paper, glass, jute, cartons, boxes and their wastes, sacks and bags other than those* specifically *mentioned in serial No (3) of clause 'a' of subsection 1 of section 6'.* The applicant would contend that the clause '*other than those specifically mentioned in serial No (3) of clause 'a' of subsection 1 of section 6'* was brought in as per Finance Act 2012 in consequence of the amendment bringing an Entry *'Carry bags made of plastic which have a self carrying feature, commonly known as vest type bags for any other feature to carry commodities excluding 'D' punched bags'.*

6. Further the applicant defines container, trays, lids, bowl and plates as under.

> *Container is an object such as a box, or a bottle which can be used for holding something, especially for the purpose of carrying or storing food, drink etc. It is known to all that, in Restaurants, Railway canteens etc., food items are sold as parcel which are packed in containers. This container is not plates or cups or leaves.*
>
> *Trays are flat shallow container with a raised rim used for carrying food or drink. This too is not plates, cups or leaves.*
>
> *Lids are removable or hinged cover for the top of container. This too is not plate, cup or leaves.*
>
> *Bowl is a round deep dish or basin used for conveying food or liquid. This too is not plates, cups or leaves.*

Whereas plate means a flat dish typically circular or square from which food is eaten or served and that plate cannot be used for packing foods. Cup is used for drinking water, tea etc.

7. The applicant would then contend that in short as per the Finance Act 2013, plates, cups, and leaves made of plastic alone have been brought under 20% goods, whereas containers, bowls, trays, lids etc have not been included in the above Entry 'Disposable plates, cups and leaves made of plastic'. Even 'Tumblers' has been brought in the above Entry only as per Finance Act 2016 by inserting the words 'Tumblers' in serial No 3A as per section 9 (1) (b) of the Finance Act 2016.

8. The applicant would also contend that from the above description it can be seen that the items plates, cups and leaves are entirely different and distinct from containers, trays, lids, bowls and boxes. The main distinguishing feature being, plates or cups do not have the ability to be used as packing materials, while the rest of the items are packing materials used for packing and conveying. These types of items would come under Entry 174 of List A of Third Schedule to KVAT Act 2003, taxable at 5%. In this connection, it is pertinent to point out that in Entry 174 of List A of Third Schedule to KVAT Act 2003, no amendment was made after the insertion of Serial No 3A of the Table to Clause 'a' of section 6 (1) of the KVAT Act 2003, like the one brought in as per Finance Act 2012, that 'other than those specifically mentioned in Serial No 3 of Clause (a) of sub section (1) of section 6' when Serial No 3 of Clause (a) of sub section (1) of section 6 was brought in.

9. The applicant has relied on the judgment of the Constitution Bench of **Hon'ble Supreme Court of India in Mathuram Agarwal v. State of Madhya Pradesh Appeal** (Civil) 1990 of 1995, 1999 (4) Suppl SCR 195 wherein it was held that,

"The intention of the Legislature in a taxing statute is to be gathered from the language of the provisions particularly where the language is plain and unambiguous. In a taxing statute, it is not possible to assume any intention or governing purpose of the statute more than what is stated in the plain language. It is not the economic result so to be obtained by making the provisions which is relevant in interpreting a fiscal statute. Equally impermissible is an interpretation which does not follow from the plain, unambiguous language of the statute. Words cannot be added to, or substituted so as to give a meaning to the statute which will serve the spirit and intention of the Legislature. The statute should clearly and unambiguously convey the three components of the tax law, i.e., subject of the tax, a person who is liable to pay the tax and the rate at which tax is to be paid. If there is any ambiguity regarding any of these ingredients in a taxing

statute, then there is no tax in law. Then it is for the Legislature to do the needful in the matter".

10. The applicant has requested to clarify the rate of tax of plastic tray, plastic containers, plastic box, plastic bowl and plastic lid.

11. The authorised representative of the applicant was heard in the matter and the contentions raised were examined.

12. The applicant has sought the rate of tax of plastic tray, plastic containers, plastic box, plastic bowl and plastic lid. In support of his contention, the applicant has produced a certificate issued from the office of the Assistant Commissioner of Central Excise wherein it is certified that

"they are classifying the goods manufactured by them under Chapter Heading 3923 of Central Excise Tariff Act, 1985 as "Articles for the conveyance or packing of goods, of plastics; stoppers, lids, caps and other closures, of plastics", attracting central excise duty @ 12.5% ad valorem."

13. As contented by the applicant, the items plates, cups and leaves made of plastic were brought in the higher rate through Kerala Finance Act 2013 and tumblers have been brought in this entry only on 01-04-2016 through KFA 2016. If the Legislature had any intention to include those items in the higher rate of tax @ 20%, then those items would have been specifically brought under the table to sec. 6(1)(a). The judgment of the Hon'ble Supreme Court of India in Mathuram Agarwal's case is significant in this regard. In the light of these facts, it is hereby clarified 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%. Plastic lid would also be taxable @ 5% by virtue of Entry 174 of List A to the Third Schedule, bearing HSN code 3923.50.

The issues raised above are clarified accordingly.

T.K. Ziavudeen	**Dr. A. Bijikumari Amma**	**N. Thulaseedharan Pillai**
Joint Commissioner (Law)	**Joint Commissioner (A&I)**	**Joint Commissioner (General)**
O/o CCT	**O/o CCT**	**O/o CCT**

To

M/s. Talash Plastopacks,

Swaraj Plywood Road,
Pappinisseri, Kannur – 670 561

DEPARTMENT OF COMMERCIAL TAXES, KERALA
PROCEEDINGS OF THE AUTHORITY FOR CLARIFICATION U/s.94 OF THE KERALA VALUE ADDED TAX ACT, 2003.

Members present are:

1. Dr. A. Bijikumari Amma.
Joint Commissioner (A & I),
Office of the Commissioner of Commercial Taxes, Thiruvananthapuram.

2. N. Thulaseedharan Pillai.
Joint Commissioner (General),
Office of the Commissioner of Commercial Taxes, Thiruvananthapuram.

3. Harindranath K.R.
Deputy Commissioner (Internal Audit),
Office of the Commissioner of Commercial Taxes, Thiruvananthapuram.

Sub :- KVAT Act, 2003 – Clarification U/s 94 – Rate of tax of maize poha / maize flakes – Orders issued.

Read:- 1. Clarification Order No. C3/29614/12/CT dtd. 06/04/2013
2. Judgment of Hon'ble High Court in O.T.(Appeal) Nos. 6 of 2013, dated 28.10.16
3. Application dtd. 17.01.2017 from Smt. Ramani, Kanholy Traders, Calicut.

ORDER No.CT/6689/17-C3 DATED 17/08/2017

1. Smt. Ramani, Kanholy Traders, Calicut had preferred an application dtd. 06.04.13 seeking clarification on the rate of tax of the commodity 'Maize Poha'.

2. Accordingly, as per Order No. C3-2378/13/CT dtd. 27.11.13 it was clarified that the commodity 'Maize Poha' is not a flour but flakes which is aptly covered by the HSN Code 1104.23.00.

3. Aggrieved by the order, the applicant preferred OTA Nos. 6 of 2013 before the Hon'ble High Court of Kerala. The contention of the appellant is that there was mis-directed approach by the Clarification Authority in as much as the article under consideration was cornflakes which is a food product and which is sold by the appellant otherwise than under a brand name registered under the Trademarks Act, 1999. The Hon'ble Court vide its judgment dtd. 28.10.2016 directed the appellant to seek appropriate clarification u/s. 94 of the Act, including that cornflakes, which it

deals with, falls under the entry at serial No. 49 of the Third schedule to the Act on the following grounds.

> *The learned Senior Government Pleader for the Department of Commercial Taxes is justified in pointing out that such an approach cannot be adopted in first time in the appeal, in as much as the appellant/dealer had not such a case before the Clarification Authority, and therefore, the decision making process having been issue specific on the product or article, which was subjected to the clarification, the authority cannot be criticized of having decided the issues without reference to the Third Schedule to the Act. He says that in the absence of any specific claim by the appellant before the Clarification authority on such a line, no prejudice can be shown in this appeal.*
> *Having bestowed our anxious consideration, we are of the view that the appellant is not entitled to urge the plea now projected in the appeal for the first time, though we find that the said contention is one which the appellant can raise before the Clarification Authority. Therefore, notwithstanding the impugned order, the appellant will be at liberty to seek appropriate clarification from the Clarification Authority under Section 94 of the Act, including that cornflakes, which it deals with, falls under the entry at serial No. 49 in the Third Schedule to the Act. Without prejudice to that, this appeal is dismissed.*

4. As per the direction of the Hon'ble High Court, the applicant M/s. Kanholy Traders has preferred an application U/s. 94 of the Kerala Value Added Tax Act, 2003, seeking clarification as to the rate of tax of 'Maize Poha'/ 'Maize flakes'.

5. The applicant would contend that as the non obstante clause has been used in the final order, the clarification dated 06/04/2013, has no validity now. The clarification has to be issued afresh considering all the contentions raised by the dealer. And in compliance of the order of the Hon'ble High court of Kerala, the applicant is again seeking clarification to declare that the product will come under entry 49 of the third schedule to the KVAT Act, having HSN Code 1904.10.10.

6. The applicant has described the process of producing Maize poha/maize flakes as follows - Raw maize is cleaned, steamed (swelled) and then flattened in a flattening machine. Then the applicant would contend that this process will make the product fall under entry 1904 of the Central Excise and Tariff Act. HSN code of corn flakes is 1904.10.10. This HSN code is given to entry 49(3) of third schedule of the KVAT Act 2003. Section 49 (3) is extracted as under:

49	***Food products like pickles, corn flakes, savouries, sweets made of groundnuts, gingelly, other than those sold under brand name registered under the Trade Marks Act, 1999***
	(3) Corn flakes

7. The applicant further argued that as the commodity is obtained by processing Maize / corn to make it edible, it will rightly comes under entry 1904.10.10 of chapter 19 of central excise and tariff Act. Entry 1904 of Central Excise and Tariff Act reads as under:

1904	***PREPARED FOODS OBTAINED BY THE SWELLING OR ROASTING OF CEREALS OR CEREAL PRODUCTS (FOR EXAMPLE, CORN FLAKES); CEREALS [OTHER THAN MAIZE (CORN)] IN GRAIN FORM OR IN THE FORM OF FLAKES OR OTHER WORKED GRAINS (EXCEPT FLOUR, GROATS AND MEAL), PRE-COOKED OR OTHERWISE PREPARED, NOT ELSEWHERE SPECIFIED OR INCLUDED***
1904 10	*Prepared foods obtained by the swelling or roasting of cereals or cereal products:*
1904 10 10	*Corn flakes*
1904 10 20	*Paws, Mudi and the like*
1904 10 30	*Bulgur wheat*
1904 10 90	*Other*
1904 20 00	*Prepared foods obtained from unroasted cereal flakes or from mixtures of unroasted cereal flakes and roasted cereal flakes or swelled cereals*
1904 30 00	*Bulgur wheat*
1904 90 00	*Other*

8. The applicant would further contend that section 11 of the central excise and tariff act clearly states that, that chapter does not cover corn flakes or other products of heading 1904. Hence corn flakes/Maize flakes cannot be classified under chapter 11 of the central excise and tariff act. Chapter 11 of the central excise and tariff Act in respect of Maize (corn) deals with other worked grains (for example, hulled, pearled, sliced or kibbled). This process does not make the Maize edible. But the above product is edible; it can be eaten for breakfast. Therefore this product does not come under Chapter 11 of the central excise and tariff Act.

9. The applicant also argued that the Hon'ble High court of Kerala in both the interim and final order in OTA 6/2013 had stated that, the product that the applicant deals is 'corn flakes'. Corn flakes has a definite entry as per entry 49 of the third schedule to the KVAT Act 2003. The clarification Authority while issuing clarification dt.6/04/2013 had not examined whether the commodity will come under third schedule to the KVAT Act. The authority found that, the commodity will not come under second schedule to the KVAT Act 2003. But whether the commodity will come under third schedule to the KVAT Act 2003, was not discussed at all. On finding that

the commodity will not come under the second schedule, the authority jumped to a conclusion that, it is not coming under any of the schedules to the KVAT Act, without properly examining the place of the commodity in third schedule to the KVAT Act.

10. The applicant would then contend that it is not correct to say that the dealer had in their earlier clarification, had no claim that, the commodity will come under 5%. In the Application for clarification the proprietor in her application Dt. 10/09/2012, had requested as follows:

> *"I am a dealer of sreeji Agro corn products. They are manufacturing Maize products. In that I am dealing in MAIZE POHA (i.e. Avil in Malayalam), I want to clarify its tax whether 1 % or 5 %.*

11. The applicant further argued that Maize Poha is nothing but corn flakes. Maize is also popularly called as 'corn'. Poha means Avil. Flakes also mean Avil. Hence Maize Poha literally can be called corn Flakes. This Aspects, and how this commodity is prepared is elaborately discussed by the Hon'ble High court of Kerala in the case of **Kanholy Ramankutty Nair Vs State of Kerala** [2008 (2) KU2G7]. In Para 24 and 25, the court observed as follows:

> *"24. The term Maize derives from the Spanish form (Maiz) of the indigenous "taino" term for the plant, and is the form most commonly heard in the United Kingdom. In the United States, Canada and Australia, the usual term is corn, which originally referred to any grain, but now refers exclusively to Maize, having the shortened from the form 'Indian Corn "*
> *25 In some cases Maize is heated and steamed then processed for flattening and then made it as flattened Maize (Makkai Powa) or Maize Powa]"*

Also Customs, Excise and Gold tribunal Mumbai in the case of **Favourite food products Vs Commissioner of Central excise** as per order 9th October 2000 had classified this product into heading 1904 of the central excise tariff.

12. The applicant also contends that as per chapter 19 of the central excise and tariff Act, entry 1904 includes prepared foods obtained by the swelling or roasting of cereals or cereal products, (for example corn flakes) in grain or in the form of flakes or other worked grains pre-cooked or otherwise prepared not elsewhere specified or included. This product can be classified in this chapter 1904. This product is obtained by swelling of Maize and flattening it into flakes. Note 4 of the chapter 19 of the central excise and tariff act says as follows:

> *"4. For the purpose of heading 1904, the expression 'otherwise prepared 'means prepared or processed to an extent beyond that provided for in the heading or notes to Chapter 10 or 11." But the clarification created a situation that a commodity prepared or*

processed to an extent beyond that provided for in the heading or note to chapter 11, i.e, coming under chapter 19, has lesser rate of tax (5%), and commodity which is processed to a lesser extent than provided in chapter 19 has higher rate of tax (14.5%).

Thus this product comes under entry 1904.10.10 of the central excise tariff and consequently under entry 49 of the third schedule to the KVAT Act. Also, as there is definite entry in the Third schedule of KVAT Act 2003, in respect of corn flakes, namely serial No. 49 of the third schedule to the KVAT Act 2003, there is no question of classifying this product as an unclassified item attracting higher rate of tax, under entry 103 to the fifth schedule to the KVAT Act 2003.

13. The authorised representative of the applicant was heard in the matter and the contentions raised were examined.

14. The applicant has sought the rate of tax applicable to 'maize poha / maize flakes'. Maize poha is also referred to as corn flakes. The said commodity is covered under HSN Code 1904 10 10 in Chapter 19 of the Customs Tariff Act, 1975. The commodities in the schedules to the KVAT Act are allotted with code numbers as adopted by the Customs Tariff Act. In the KVAT Act, 'corn flakes', with HSN code 1904.10.10 is covered by Entry No. 49 of the third schedule.

15. As such, it is hereby clarified that the commodity 'maize poha/maize flakes' classified under the HSN code 1904.10.10 would be taxable at the rate of 5% by virtue of Entry 49 of the Third Schedule to the Kerala Value Added Tax Act, 2003.

The issues raised above are clarified accordingly.

Dr. A. Bijikumari Amma **Joint Commissioner (A&I)** **O/o CCT**	**N. Thulaseedharan Pillai** **Joint Commissioner (General)** **O/o CCT**	**Harindranath K.R** **Deputy Commissioner(Internal Audit)** **O/o CCT**

To

Smt. M.Ramani,
Kanholy Traders,
Big Bazar, Calicut – 673 001

DEPARTMENT OF COMMERCIAL TAXES, KERALA
PROCEEDINGS OF THE AUTHORITY FOR CLARIFICATION
U/s.94 OF THE KERALA VALUE ADDED TAX ACT, 2003.

Members present are:

1. T.K. Ziavudeen.
Joint Commissioner (Law),
Office of the Commissioner of Commercial Taxes, Thiruvananthapuram.

2. Dr. A. Bijikumari Amma.
Joint Commissioner (A & I),
Office of the Commissioner of Commercial Taxes, Thiruvananthapuram.

3. N. Thulaseedharan Pillai.
Joint Commissioner (General),
Office of the Commissioner of Commercial Taxes, Thiruvananthapuram.

Sub:- KVAT Act, 2003 – Clarification U/s 94 – Tax liability u/s. 6(2) of the KVAT Act on rubber sold interstate – Orders issued.

Read:-1. Clarification Order No.C3/2378/13/CT dtd.27-11-2013
2. Judgment of Hon'ble High Court in O.T.(Appeal) Nos. 9 of 2013, 6 & 7 of 2014
3. Application dtd. 09-11-16 from M/s. N.M.Brothers, Kasargod, M/s. Sachin Traders, Kozhikode and M/s. Arecode Traders, Kozhikode.

ORDER No.CT/815/17-C3 DATED 22/08/2017

1. This application for clarification was filed by Sri. Abdulla, Power Attorney Holder of Sri. Sabeer Babu .T.P., Sachin Traders, Kozhikode; Sri.A.M. Rahman, Areacode Traders, Kozhikode and Sri.N.M. Basheer, N.M. Bros., Kasaragod respectively as per the direction of the Hon'ble High Court of Kerala in OTP Nos.6, 7 and 9 dtd.17-10-2016. Originally, Sri. Vinod Kumar.P, STP, Kasargod had preferred an application dtd. 21.01.13, seeking clarification regarding the interstate sale of Natural Rubber and exemption from payment of Central Sales Tax in the light of S.R.O.No.804/2008, & S.R.O.No.753/2011. The applicant had requested to clarify the following points:-

a. Whether interstate sale of rubber procured from the agriculturist can be sold to outside State against C form at 2% in the same month without suffering local VAT.

b. Whether the Natural rubber procured from the registered dealer can be sold interstate against C form at 2% and the excess IPT can be claimed as refund at the end of the year by filing form 21CC.

c. Whether a dealer buying natural rubber from an agriculturist and selling the entire quantity so purchased in the course of interstate trade in the month in which the purchase is made is liable to pay tax u/s. 6(2) where tax @ 2% is collected on interstate sale.

2. Accordingly, as per Order No.C3-2378/13/CT dtd. 27.11.13 it was clarified as follows:

> *(a) The dealer has to sell the goods covered under the above SROs to a registered dealer in another State at the CST rate of 0% against C form and shall pay tax u/s. 6(2) of the KVAT Act, 2003 for such goods.*
>
> *(b) Independent to the above stated position (a), under no circumstances, special rebate will be allowed for the commodities covered by the SROs, by which tax has been exempted on interstate sale to registered dealers.*

3. Aggrieved by the order, M/s. Sachin Traders, Kozhikode, M/s. Arecode Traders, Kozhikode and M/s. N.M.Brothers, Kasargod preferred OTA Nos. 6, 7 of 2014 & 9 of 2013 before the Hon'ble High Court of Kerala. The Hon'ble Court vide its judgment dtd. 17.10.2016 set aside the impugned order dtd.27-11-2013 and directed the appellants to mark appearance before the Authority for clarification u/s.94 of the VAT Act for reconsideration of the matter. While disposing the appeal the Hon'ble Court observed as::

> *"The short issue that arises for decision is as to whether the eligibility of exemption granted through SRO.No.804/2008 and carried forward through SRO.No.753/2011 is of such nature which makes it compulsory for a dealer to accept the benefit thereof which is an exemption from payments under the Central Sales Tax Act.* ***If the component of VAT Act that is paid or suffered by the dealer is larger than the amount of benefit that would have accrued by SROs, as regards Central Sales Tax Act, the question would be whether it will be open and available to the dealer to choose as to whether he would take the benefit of the SROs or whether he would choose to pay CST.*** *Viewed in this angle, we are of the view that the clarification rendered by the authority needs to be deliberated upon further particularly on the issue as to the eligibility of a dealer to insist that he would not take the benefit of the SROs. Incidentally, the question which may crop up during consideration of this issue would also arise while finally answering the clarification sought for before the authority concerned."*

4. As per the direction of the Hon'ble High Court, the above applicants have preferred applications U/s.94 of the Kerala Value Added Tax Act, 2003, seeking clarification as to whether a dealer buying natural rubber from an agriculturist and selling the entire quantity so purchased in the course of interstate trade in the month in which the purchase is made has to pay tax u/s. 6(2) of the KVAT Act where tax @ 2% is collected on interstate sale.

5. The applicants would contend that as per notification issued in G.O.(P) No.159/2008/TD dated 31-07-2008, which was published as SRO.No.804/2008, exemption had been granted, inter alia, in respect of the tax payable under sub-section (1) and sub-section (2) of section 8 of the Central Sales Tax Act, 1956 on the turnover of interstate sale of natural rubber subject to the condition that the natural rubber has suffered tax under the Kerala Value Added Tax Act, 2003. The Notification reads:

> *"In exercise of the powers conferred by sub-section (5) of section 8 of the Central sales Tax Act, 1956 (Central Act, 74 of 1956), the Government of Kerala having satisfied that it is necessary in the public interest so to do, hereby exempt the tax payable under subsection (1) or sub-section (2) of the said section, on the turnover of sale of Natural Rubber coming under Entry 134 of List A of the Third Schedule of Kerala Value Added Tax Act, 2003 (30 of 2004) and tread rubber (HSN 4006.10.00) in the course of inter-state trade or commerce subject to condition that natural rubber in the case of natural rubber including compounded rubber, and natural rubber used in the production of tread rubber in the case of tread rubber have suffered tax under the Kerala Value Added Tax Act, 2003 (30 of2004)."*

6. Then, as per notification G.O. (P) No.181/2011/TD dated 30-11-2011 (SRO.753/11 dated 30-11-2011) issued in supersession of the notification SRO. 804/08, Government have limited the exemption to the tax payable under section 8(1) of the CST Act and Rubber Latex, including centrifuged latex, has been kept out of the purview of the notification. The said notification reads:

> *"In exercise of the powers conferred by sub-section (5) of section 8 of the Central sales Tax Act, 1956 (Central Act, 74 of 1956), and in supersession of the notification issued under G.O. (P) No.159/2008/TD dated 31-07-2008 and published as SRO.804/08 in the Kerala Gazetted Extraordinary No.1651 dated 31st July, 2008, the Government of Kerala having satisfied that it is necessary in the public interest so to do, hereby direct that on the fulfillment of the requirement of sub-section (4) of section 8 of the said Act, no tax shall be payable under subsection (1) of the said section on the interstate sale of Natural Rubber falling under sub-Entry(1) and tread rubber with HSN code 4006.10.00 falling under sub-entry (6) of serial number 134 of List A of the Third Schedule to the Kerala Value Added Tax Act, 2003 (30 of 2004) subject to the condition that such natural rubber or the natural rubber used in the processing, conversion or manufacture of other types of natural rubber and tread rubber mentioned above have suffered tax under the Kerala Value Added Tax Act, 2003 (30 of 2004), and that exemption under this notification shall not be available to all types of rubber latex including centrifuged latex mentioned in sub-entry (1) of serial number 134 of List A of the Third Schedule to the Kerala Value Added Tax Act, 2003 (30 of 2004)."*

So, as per the notifications, exemption in respect of interstate sale is earned only if the goods sold interstate has suffered tax under the KVAT. Tax under the KVAT Act includes tax under sub-section (1) or sub-section (2) of section 6.

7. The applicants would further contend that the general rule of interpretation of statutes is that the intention of the legislature is primarily to be gathered from the language used, which means that attention should be paid to what has been said as also to what has not been said (**Gwalior Rayon Silk Mfg. (Weaving) Co. Ltd. vs. Custodian of Vested Forests** (AIR 1990 SC 1747 at p.1752). **In State of Jharkhand and another vs. Govind Singh** (AIR 2005 SC 294 at p.297) the Hon'ble Supreme Court said:

> *"15. Where, however, the words were clear, there is no obscurity, there is no ambiguity and the intention of the Legislature is clearly conveyed, there is no scope for the court to innovate or take upon itself the task of amending or altering the statutory provisions. In that situation the Judges should not proclaim that they are playing the role of a law-maker merely for an exhibition of judicial valour. They have to remember that there is a line, though thin, which separates adjudication from legislation. That line should not be crossed or erased. This can be vouchsafed by an "alert recognition of the necessity not to cross it, an instinctive, as well a strained reluctance to do so."*

8. The applicants have stated that the same stand has been taken by the **Hon'ble Supreme Court in Keshavji Ravji & Co. vs. Commissioner of Income Tax** (AIR 1991 SC 1806), where the Court held:

> *"As long as there is no ambiguity in the statutory language, resort to any interpretative process to unfurl the legislative intent becomes impermissible. The supposed intention of the legislature cannot then be appealed to whittle down the statutory language which is otherwise unambiguous. If the intendment is not in the words used it is nowhere else. The need for interpretation arises when the words use in the statute are, on their own terms, ambivalent and do not manifest the intention of the Legislature."*

9. The applicants would then argue that the term used in the notification is "have suffered tax under the Kerala Value Added Tax Act, 2003" and not "liable to tax under the KVAT Act". So, where the notification uses the words "have suffered tax under the Kerala Value Added Tax Act,

2003" it only means that the sufferance of the tax under the KVAT Act should precede the interstate sale in respect of which exemption is claimed under the notification. As per sub-rule 22(1) of the KVAT Rules, tax under sub-section (1) or sub-section (2) of section 6 is payable by a dealer on or before the fifteenth, twentieth or twenty fifth of the month following the month to which the tax relates. Unlike in the case of rubber purchased from a VAT dealer, where the selling dealer collects VAT from the buyer at the time of sale itself and the goods suffer tax under the Act, in the case of rubber purchased from a grower, the goods can be said to have suffered tax only when the month of purchase is over and the monthly return is due and the dealer pays tax in accordance with rule 22(1). So, where a dealer makes an interstate sale of rubber purchased by him from a person other than a registered dealer in the month of purchase itself, it cannot be said that the goods have suffered tax under the KVAT Act at the time of making interstate sales and the seller will not be eligible for exemption under SRO.804/08 and SRO.753/11 and he will be liable to pay CST on such sales.

10. The applicants content that as per the 2nd proviso to sub-section (1) of section 12 of the KVAT Act, *"where the goods in respect of which tax is payable under sub-section (2) of section 6 is sold in the State or in the course of interstate trade or used in the course of manufacture of taxable goods in the month in which it is purchased, the special rebate allowable in respect of such goods resold or sold in the course of interstate trade or used in the manufacture of goods liable to pay tax under this Act or Central Sales Tax Act, 1956 may be availed in the month itself."* Further, column 7 of Part A (4) of Form 10 also allows exemption for the value of the goods liable to tax under section 6(2), disposed of during the month. Since, in the above case, the dealer making interstate sale in the month of purchase (from a person other than a registered dealer) has already paid CST on such goods, he will be eligible for claiming special rebate in respect of the purchase tax payable under section 6(2) (by claiming exemption in respect of the purchase value of the goods so sold interstate).

11. The applicants further referred to the judgment of the **Hon'ble Supreme Court in State of M.P. And others vs. Indore Iron & Steel Mills Pvt. Ltd.**, wherein the Hon'ble Court has held:

> *"The words of the notification dated 8-10-1978 are very clear and cannot be subjected to any construction but one, namely, that only goods upon which entry tax under the Entry tax Act has been paid are entitled to the exemption thereunder. There has to be actual payment. The impact of the entry tax upon the goods for which the exemption sought has to be felt; only then is the exemption available. The use of the word "suffered" makes this plain."*

The term used in the notification is "have suffered tax under the Kerala Value Added Tax Act, 2003". So, it is contended that the above judgment of the apex court squarely applies to the notification as well.

12. The authorised representative of the applicants was heard in the matter and the contentions raised were examined in the light of the judgment of the Hon'ble High Court.

13. Originally one Sri.Vinodkumar .P, Sales Tax Practitioner, Cheruvathoor, had preferred an application on 21-01-2013 under Sec 94 of the KVAT Act seeking clarification on the interstate sale of natural rubber and exemption from payment of central sales tax in the light of the notifications issued as per SRO.No.804/2008 and superseded by SRO.No.753/2011. The specific questions asked by him for clarifications were as follows:

(a) whether interstate sale of rubber procured from the agriculturist can be sold to out-side State against 'C' Form at 2% and the excess IPT can be claimed as refund at the end of the year by filing Form 21CC.

(b) whether the Natural rubber procured from the registered dealer can be sold inter-state against 'C' Form at 2% and the excess IPT can be claimed as refund at the end of the year by filing Form 21CC.

(c) Whether a dealer buying natural rubber from an agriculturist and selling the entire quantity so purchased in the course of interstate trade in the month in which the purchase is made is liable to pay tax u/s.6(2) where tax @ 2% is collected on interstate sale.

14. The clarification authority as per Order No.C3-2378/13/CTdtd.27-11-2013 clarified the above points as under:

"*(a) The dealer has to sell the goods covered under the above SROs to a registered dealer in another State at the Central Sales Tax rate of 0% against 'C' Form and shall pay tax under Sec.6(2) of the KVAT Act, 2003 for such goods.*

(b) Independent to the above stated position (a) under no circumstances, special rebate will be allowed for the commodities covered by the SROs by which tax has been exempted on interstate sale to registered dealers."

15. In exercise of the powers conferred under sec.8(5) of the CST Act, the State Government issued notification vide SRO No.804/2008 dt.31-07-2008, whereby exemption was granted in respect of the tax payable, under sub-section (1) or sub-section (2) of sec. 8, on the turnover of sale of natural rubber coming under entry 134 of List A of the third schedule of KVAT Act 2003, and tread rubber (HSN 4006.10.00), in the course of interstate trade or commerce, subject to the condition that natural rubber, in the case of natural rubber including compounded rubber, and natural rubber used in the production of tread rubber, have suffered tax under KVAT Act, 2003.

16. Subsequently, in supersession of the above S.R.O., the State Government issued SRO No. 753/2011 dtd.30-11-2016. This S.R.O. was issued primarily to rectify the mistake that occurred while issuing SRO 804/2008. SRO 804/2008 was issued in violation of sec. 8(5), in as much as the said sub-section authorized the State Government to grant exemption or reduction in the rate of tax, under the CST Act, only in respect of tax payable under sub-section (1) of that section, i.e., in respect of sale to a registered dealer outside the State, and not in respect of tax payable under sub-section (2) of the said section. Further, vide SRO.753/2011, the Government excluded all types of rubber latex including centrifuged latex, which were covered under SRO No. 804/2008, from the purview of exemption.

17. Since sec.8(5) of the CST Act begins with a non obstante clause, a notification, granting exemption or fixing a lower rate of tax, issued under this sub-section will prevail over the rate of tax fixed under sub-section (1) of the said section. In this context the notification issued under Sec.8(5) of the CST Act is mandatory. Therefore, in respect of inter-state sale of rubber by registered dealers from Kerala to registered dealers of other States, the CST rate applicable is 0% with C form and not 2% with C form and should have suffered tax under the KVAT Act.

18. The Commissioner of Commercial Tax issued a Circular vide No.17/2013 dtd.05-10-2013, CCT clarifying the meaning and content of above notification and issued directions for the smooth implementation of the same. The relevant portion is extracted as follows:

"*The rate of tax on interstate sale to registered dealers is fixed as per sub-section (1) of Sec.8 of CST Act. Presently, the tax rate as per sub-sec.(1) of Sec.8 is 2%. Once the State Govt. has notified a lower rate or exemption under sub-sect.(5) of Sec.8 of the CST Act for a commodity, with respect to that State, the rate fixed under sub-sect.(5) will prevail over the rate fixed under sub-sec.(1). Hence, for removal of any doubts, it is clarified that with regard to interstate sale of rubber by registered dealers from Kerala to registered dealers of other States, the CST rate applicable is "0% with 'C' Form" not "2% with 'C' Form".*

19. The decision rendered by the Hon'ble Supreme Court of India in the case of State of M.P. & Ors. Vs. Indore Iron and Steel Mills Pvt. Ltd. (1998) 6 SCC 416, is examined with reference to the above notification. The Hon'ble SC held as follows:

"In our view, the words of the said notification under the States Sales Tax Act are so clear that they leave no doubt whatsoever and Cannot be subjected to any construction but one, namely, that only goods upon which entry tax under the Entry Tax has been paid are entitled to the exemption there under. There has to be actual payment. The impact of the entry tax upon the goods for which the exemption is sought has to be felt; only then is the exemption available. The use of the word "suffered" makes this plain."

20. In view of the decision rendered by the Hon'ble Supreme Court, it can be clarified that the word "suffered" used in the notification shall mean "actual payment of tax". Therefore, in view of the foregoing discussions, notification issued under Sec.8(5) of the Central Sales Tax Act is mandatory and there is no question of input tax credit / special rebate and refund.

21. In view of the notification and the circular issued in this regard, interstate sales of rubber procured from agriculturists should have suffered tax under the VAT Act and the CST rate applicable is 0% with 'C' Form. It is further clarified that there shall be no claim of input tax credit / special rebate and no refund of the tax paid on purchase from registered dealers as well as from unregistered dealers as the case may be.

The issues raised above are clarified accordingly.

T.K. Ziavudeen **Joint Commissioner (Law)** **O/o CCT**	**Dr. A. Bijikumari Amma** **Joint Commissioner (A&I)** **O/o CCT**	**N. Thulaseedharan Pillai** **Joint Commissioner (General)** **O/o CCT**

To

M/s. N.M.Brothers,
Near Telephone Exchange,
Cheemeni, Kasargod

M/s. Arecode Traders,
Koodaranhi, Kozhikode

M/s. Sachin Traders,
Thottumukkom,
Pallithazha, Kozhikode

File No.CT/16868/2017-C1 1

Office of the Commissioner,
State Goods and Services Tax Kerala,
Thiruvananthapuram.,
Dated: 19/10/2017

From

The Commissioner

To

The DGM Commercial,
Indian Rare Earths Limited, Chavara,
Kollam-691583.

Sir,

Sub: KSG&STD – Purchase of goods kept out of the GST against C - Form- clarification requested- reg.

Ref:- Your letter dt.06/09/2017.

As per section 8(3) (b) of the CST Act 1956, a registered dealer can effect interstate purchase, against C-Form, of goods or classes of goods specified in his certificate of registration intended for re-sale or for use in the manufacturing or processing of goods for re-sale or in the telecommunication network or in mining or in the generation or distribution of electricity or any other form of power.

In view of implementation of GST w.e.f 01/07/2017, definition of goods under clause (d) of section 2 of the CST Act has been amended, vide Taxation Laws (Amendment) Act,2017 dated 4th May 2017 of the Govt. of India and HSD comes under the definition of goods.

Since HSD has been kept out of the purview of GST, it is clarified that issuance and use of declaration forms under the CST Act including declaration in Form C will continue as prior to 1st July 2017 for purchasing HSD for use in mining purpose as claimed and on condition that such procured HSD cannot be used for any other purposes.

Yours faithfully,
THULASEEDHARAN PILLAI
JOINT COMMISSIONER
JOINT COMMISSIONER