

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, Kanholly Traders, Calicut.

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

1. Smt. Ramani, Kanholly 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. Kanholly 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	<i>Prepared foods obtained by the swelling or roasting of cereals or cereal products:</i>
1904 10 10	<i>Corn flakes</i>
1904 10 20	<i>Paws, Mudi and the like</i>
1904 10 30	<i>Bulgur wheat</i>
1904 10 90	<i>Other</i>
1904 20 00	<i>Prepared foods obtained from unroasted cereal flakes or from mixtures of unroasted cereal flakes and roasted cereal flakes or swelled cereals</i>
1904 30 00	<i>Bulgur wheat</i>
1904 90 00	<i>Other</i>

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.

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O/o CCT

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

Harindranath K.R
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To

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