CASE NO.:
Appeal (civil) 6221 of 1999

PETITIONER:
The Commissioner, Trade Tax. U.P.

RESPONDENT:
S/S National Cereal Product

DATE OF JUDGMENT: 07/03/2005

BENCH:
Ruma Pal, Arijit Pasayat & C.K. Thakker

JUDGMENT:
J U D G M E N T

WITH
CA. Nos. 6222- 6225/1999
CA No. 4313/2001,
CA Nos \005\005\005\005..of 2005
@ SLP(C ) Nos.7423-25/2004

RUMA PAL, J.

Leave granted in special leave petitions.

The dispute in this case is whether germinated barley or malt is a cereal for the purposes of three notifications. Malted barley is barley which is soaked in water and upon germination, dried. The first notification is issued under Section 3D of the U.P. Sales Tax Act, 1948 read with Section 21 of the U.P. General Clauses Act, 1904 and is dated 30th May, 1975. It provided that with effect from 18th June, 1975 the turnover of first purchases of inter alia foodgrains including cereals and pulses but excluding Sawan, Kodon, Mandua, Kakun, Manjhri (or Ankri), Kutu, Ramkana and Paddy would be liable to tax under clause (b) of sub-section (1) of Section 3D at the rates mentioned against it.
The second Notification is dated 11th September, 1976. This notification was issued under sub-section (2A) of Section 3A of the UP Sales Tax Act, 1948. It provided that with effect from 11th September, 1976 the turnover in respect of foodgrains (including cereals and pulses) other than cereals and pulses as defined in Section 14 in the Central Sales Tax Act, 1956 shall be liable to tax at the reduced rate of 4% at the point of sale to the consumer.
The third notification is dated 30th of April, 1977 issued under Section 3D (1) of the U.P. Sales Tax Act, 1948. It provided that with effect from 1st May, 1977, the turnover of first purchases of inter alia foodgrains including cereals and pulses other than cereals and pulses as defined in Section 14 of the Central Sales Tax Act, 1956 would be liable to tax at 4%.
Earlier the respondent assessee had claimed that the malted barley sold by it was covered by the word "cereal" in Section 14 of the Central Sales Tax Act 1956. The High Court had rejected this claim by its judgment dated 16th September, 1993 and held that malted barley was not a cereal within the meaning of Section 14 of the 1956 Act.
The respondent\027assessee then moved five rectification applications before the High Court alleging that the alternative cases that had been argued by the respondent had not been noted or dealt with by the High Court in the order dated 16th September, 1993. The alternative case of the respondent\027assessee was that even if the malted barley was not a cereal within the meaning of Section 14 of the Central Sales Tax Act, 1956 nevertheless it continued to be a

foodgrain or cereal for the purposes of the three notifications. In the further alternative it was urged by the respondent\027assessee that in any case it was the duty of the Taxing Authority to tax the assessee under the proper entry if the contention of the assessee had been negatived by the authorities. The five rectification applications were disposed of by judgment and order dated 21st September, 1994. The High Court held that the determination of the alternative cases might require evidence and therefore it was appropriate to send the case back to the Sales Tax Tribunal. Accordingly, it was ordered that the Sales Tax Tribunal shall decide the question whether the malt prepared from barley is foodgrain including cereal within the meaning of the three notifications. It was however, made clear that the Tribunal would take the finding of the Court that malt and barley were two different commodities and that malt did not fall within the definition of word 'cereal' for the purposes of Section 14 of the Central Sales Tax Act, as final.

On remand, the Tribunal re-examined the meaning of the definition "malt" and "cereal" in several dictionaries and encyclopedias and came to the conclusion that the word 'malt' was covered by the word "cereal" in the three notifications.

The High Court dismissed the revision application of the Department by independently considering the definitions given in various dictionaries and other authoritative works and came to the conclusion that malt is merely another form of barley and was a foodgrain within the meaning of the three notifications.

Impugning the decision of the High Court learned counsel for the Department submitted that the Tribunal and the High Court had erred in holding that the malt was either a cereal or a foodgrain when the order of remand, which had not been challenged by the respondent\027assessee, had already held that the malt was not a cereal.

The submission is mis-conceived. By the order dated 21st September 1994, the High Court had merely held that the barley malt was not a cereal for the purposes of Section 14 of the Central Sales Tax Act. It was clearly envisaged by the order of remand that despite such finding, barley malt could still be a cereal or a foodgrain for the purposes of the three notifications.

Counsel for the appellant then referred to various other dictionaries to contend that malt is neither cereal nor a foodgrain. The grain, according to the appellant, is a seed which is yet to be germinated. We have considered the various dictionary meanings referred to by the appellant. In none of them has the word 'grain' been limited to an un-germinated seed. On the contrary, malt has been described as a foodgrain.

The notifications by which the rate of tax has been fixed in respect of foodgrains makes it clear that the definition of foodgrains in the notifications is wider than that in Section 14 of the Central Sales Tax Act, 1956. It must be remembered that the notifications are not exception notifications but contain charging provisions. As such the onus to prove that the malted barley does not fall within foodgrains or cereals was on the Revenue. They have failed to discharge the onus.

Both the Tribunal and the High Court have concurrently found that malted barley is a foodgrain or cereal for the purposes of the three notifications for reasons that cannot be discarded as perverse. We therefore see no reason to interfere with their conclusion.

Additionally we find that the question of law formulated in the Special Leave Petition was wholly incorrect. The question of law as framed was whether the Tribunal was justified in holding that barley malt falls under the category of cereals and pulses contained in Section 14 of the Central Sales Tax Act. That was not the subject matter of remand nor decided by the Tribunal nor affirmed by the High Court.

The appeals are accordingly dismissed without any order as to costs.