Reportable

IN THE SUPREME COURT OF INDIA

CIVIL APPELLATE JURISDICTION

CIVIL APPEAL NO. 1440 OF 2010

M/s. M.P. Agencies ... Appellant

Versus

State of Kerala ...Respondent

WITH

C.A. No.3015/2015 (@ SLP (C) No. 28874/2011)

C.A. No. 4815-4818/2012

C.A. No. 4565/2012

C.A. No.2869-2873/2015 (@ SLP (C) No. 11642-11646/2014)

C.A. No. 4610-4616/2012

C.A. No. 4397-4409/2012

J U D G M E N T

Dipak Misra, J.

The appellant, M/s. M.P. Agencies, is a registered dealer under the Kerala Value Added Tax Act, 2003 (for brevity, 'the 2003 Act') and is a wholesale distributor for "Ujala Supreme" and "Ujala Stiff and Shine", which are manufactured by M/s. Jyothy Laboratories Ltd.

"Ujala Supreme" is a fabric whitener and "Ujala Stiff and Shine" is a liquid fabric stiffener. The product "Ujala Supreme" is described as fabric whitener for supreme whiteness of clothes, and "Ujala Stiff and Shine" is given the description, liquid fabric whitener for crisp and shining clothes.

2. As there was an issue relating to rate of tax applicable to the two products, the appellant filed an application for clarification before the Commissioner of Commercial Taxes, Thiruvananthapuram. The Commissioner vide order no. C7.34151/06/CT dated 25.10.2006 clarified the position which is in the nature of advance ruling by opining that the items "Ujala Supreme" and "Ujala Stiff and Shine" are commercially known as instant whiteners and the consumers who are purchasing the manufactured goods which are subjected to certain processes and are marketed as a commercially different commodity, "instant whitener", in the brand name "Ujala"', which is used as a "laundry whitener" at the end point. After so observing, the Commissioner referred to SRO 82/06 wherein the Government has notified list of commodities coming under 12.5% category and laundry whiteners have been brought under this category vide Entry No. 27. On that basis, the Commissioner held that as there is a specific Entry for the commodities, it would fall under the said Entry and the

taxable rate would be 12.5%.

3. Being aggrieved by the aforesaid clarificatory order, the appellant filed an appeal being O.T.A No. 13 of 2006 which was disposed of on 7.6.2007. The High Court remitted the matter by holding, inter alia,:-

> "In the instant case, the Commissioner without even adverting to any one of the evidence produced by the assessee, by merely relying upon how the commodity is understood in the commercial circles, has proceeded to observe that the sale of the products by the assessee requires to be taxed at 12.5%. This view of the Commissioner is contrary to sub-section (2) of Section 94 of the Act.
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> The orders passed by the Commissioner under Section 94 of the Act is not only binding on the assessee, but also binding on the assesses who are similarly placed. Further, it is binding on the assessing authority. In cases of this nature, it is expected of the Commissioner to deal with the subject which is before him for clarification in detail and then offer his opinion by way of an order. In the instant case, the Commissioner has not done that exercise. This action of the Commissioner, in our opinion, is arbitrary, illegal and improper. Therefore, the order passed by the Commissioner requires to be set aside and the matter requires to be remitted back to the Commissioner for a fresh decision, keeping in view the observations made by us in the course of the order."

4. After the matter was remitted, the Commissioner considered all the materials furnished by the appellant and heard the matter at length. It was contended by the appellant that the scheme of VAT is materially different from that of KGST principally with respect to classification of goods for the purpose of levy of sales tax based on

Harmonized System of Nomenclature (HSN), rate of tax applicable to different goods, etc. and resort to common parlance/commercial parlance test could be made only in respect of those goods, which have no reference to HSN. It was further urged that once a commodity is listed in Third Schedule along with its HSN under List A, it has to be included in that entry only.

5. The crucial question, as the Commissioner perceived, was that the determination of classification of a particular commodity would be whether the same is listed in the Third Schedule with reference to HSN or not and if so listed there would be no scope to interpret the commodity differently relying on common parlance or commercial parlance. The Commissioner took note of the fact that the appellant had purchased the product in question from Jyothy Laboratory that was charging tax at 4% on the products. Thereafter the Commissioner took note of all the contentions of the appellant and referred to the HSN Codes allotted to the commodities, Clause 43 of the Rules of Interpretation, referred to the test reports filed by the appellant and addressed to the commodity, namely, Acid Violet Paste (AVP), and at one point observed thus:-

> "Admittedly the product in question are manufactured and supplied by M/s. Jyothy Laboratories, an industrial unit. There is no dispute on the status of the unit as a 'manufacturing unit'. The unit for the production of the

products in question purchases the AVP and PVA. There is no dispute on the fact that 'the unit is not merely repacking' the materials purchased by them and marketing it under their brand name. Admittedly some process, as per the SSI certificate of the unit "a manufacturing process", is carried out before marketing their product, which brings an obvious change in the content and character and use of the products. AVP is basically an organic dye used in textile industry. By virtue of the process undertaken in the unit on the material it undergoes a basic change both in its content and character as well as in its application and use. It the new product evolved out of the process, admittedly there is only about 0.98% of AVP. According to the opinion furnished by the Institute of Chemical Techonlogy, University of Mumbai, the new product cannot any longer be used for any purpose for which AVP could have been used. These positions make it clear that the emergence of a new character for the AVP is obviously due to change in content. Thus the content character and use of the commodity has been changed and as far as the market is concerned this is a commodity holding distinct identity as a 'fabric whitener'.

It may be true that on account of the term 'manufacture' as defined in the CET Act for the purpose of levying 'excise duty' the activities leading to the emergence of the product may not amount to manufacture on microanalysis of the term for the purpose of levying 'excise duty'. But the basic fact remains that the product marketed by the unit is not AVP in its original form as classified in the CET Act. The AVP with the changed character has not been assigned any separate HSN for the purpose of CET Act. Under no stretch of interpretation can it be said that for the mere reason that a product has not been assigned any separate HSN it should be treated as a commodity holding HSN by virtue of its mere presence. In this case Ujala whitener admittedly contains only a negligible portion (about 0.98%) of AVP. As stated above definitions and classifications in CET Act are exclusively for the purpose of levying excise duty. If a commodity comes outside the ambit of a classification made under CET Act, then the interpretation

that could be given under KVAT Act would be based on the preamble and definitions under the statue."

Thereafter, the Commissioner proceeded to state thus:

"The commodity covered under HSN 3204.12.94 is specifically for Acid violets. In view of the above findings 'Ujala Whitener' can no longer be treated as an AVP in the original form for which the HSN has been assigned and so the specific entry 155(8) for Acid violets holding HSN 3204.12.94 will not encompass the product "Ujala Whitener". In the result the test to be applied is the 'common parlance' or 'commercial parlance' theory. If a consumer asks for AVP no dealer would give "Ujala Whitener", so also when "Ujala Whitener" is asked for no dealer would give the commodity 'AVP'. Instead, when a laundry brightener is asked for obviously the dealer would give "Ujala Whitener" as a similar product. So in common parlance and commercial parlance "Ujala Whitener" is known and treated as a 'laundry brightener'. In the Third Schedule there is no other entry for such products and so it cannot be classifiable under the 3rd Schedule.

In the case of 'Ujala Stiff & Shine' the raw material used is Poly Vinyl Acetate (PVA) coming under the specific HSN 3905 12 90 and admittedly the product marketed as 'Ujala Stiff & Shine' fabric stiffener is in other form and the formulation arrived at in pre paras in the case of 'Ujala Whitener' is squarely applicable in this case also."

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"It is a settled position that so long as the trade recognizes it as different commodity and its uses are different, the item has to be recognized as different goods. Here the products in question produced are by itself a commercial commodity capable of being sold or supplied with distinct identities when compared to the raw materials used. In the instant case these requirements are satisfied and so the products in question can no longer be treated as the same product as 'imputed' by virtue of its mere presence in a negligible proportion.

> As per Section 6(1)(d) goods not covered under clause (a) or (c) are taxable at 12.5% and Government is empowered to notify list of such goods. Accordingly Government had notified the list of such goods as per SRO 82/2006. Vide entry 27 interalia 'laundry brighteners' have been specifically picked out and placed in the 12.5% category making the intention clear."
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> And again
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> "The next question to be considered is in what sub entry the product in question is to be placed. The applicant had pointed out that in entry 27 of SRO 82/2006, the product 'laundry whitener' is mentioned only in the heading and not mentioned in the sub entries. By picking out the product 'laundry whitener' and including it specifically in the heading of the said entry, the intention is made specially clear. But since no specific HSN has been assigned to the products in question and the products are not specifically mentioned else where, it has necessarily to go under entry 103 i.e., the residual entry of SRO 82/2007 taxable at 12.5%."

6. In view of the aforesaid analysis, the Commissioner opined the products "Ujala Supreme" and "Ujala Stiff and Shine" are classifiable under Entry 103 of SRO 82/2006 and would attract tax at the rate of 12.5%.

7. The dissatisfaction with the aforesaid order led the assessee-appellant to file OTA No. 9 of 2007 before the High Court. The principal contention of the assessee-appellant before the High Court was that the notification i.e. SRO 82/06 which has been issued under Section 6(1)(d) of the 2003 Act cannot cover any good

specifically covered by Second or Third Schedule of the 2003 Act which attracts tax at the rate provided therein by virtue of Section 6(1)(a) of the 2003 Act.

8. As a proposition of law, the High Court opined, it deserved acceptation, but proceeded to consider whether the two items are covered by the specific entries of the Third Schedule, as contended by the appellant. Be it stated, the High Court proceeded to consider both the items separately, despite their use being similar.

9. Dealing with the "Ujala Supreme", the High Court took note of the stand of the appellant that the said item falls under Entry 155(8)(d) of the Third Schedule of HSN Code No. 3204.12.94, which covers "Acid Violets" (for short, 'AV'). The High Court posed the question whether "Ujala Supreme" sold by the appellant is an "Acid Violet" falling under the said Entry and if so, then it cannot be treated as covered by Notification issued under Section 6(1)(d) of the 2003 Act. It was urged that the manufacturer, namely, M/s. Jyothy Laboratories Ltd., was manufacturing the said item by just diluting the acid violet paste with water. Two test reports, one from SGS India Private Ltd. and the other from Institute of Chemical Technology, Matunga, Mumbai were filed before the High Court. The first report shows that on analysis of the product, namely, "Ujala Supreme", the

presence of AV49, that is acid violet paste is only less than one per cent and balance 99% is water. The second report which has been reproduced by the High Court is as follows:-

> "The acid violet paste (referred as, "AVP" hereafter) supplied to us confirms to Acid Violet 49, a synthetic dye classified into acid dye class which is used for the colouration of silk/wool at elevated temperatures in the presence of acid. "AVP" is uniform and having standard strength which is formulated and prepared as ready for use. The "AVP" as well as "Ujala" purchased from the market are subjected to instrumental analysis HPTLC (High Performance Thin Layer Chromatography) and the results are observed as below:
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> 1. Acid violet 49 is a synthetic organic Dye which can be used by fabric dyeing industry for dyeing silk/wool and other protein fibres. The dyeing of these fabrics takes place under an elevated temperature in presence of acid only.
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> 2. The diluted acid blue/violet dyes are being used in the fabric finishing industries for imparting brightness (bluish/purple tint) to white fabrics.
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> 3. As such "Ujala" cannot be used as a dye or a colouring matter as it is because, the fundamental principle of acid class of dyes is that they do not show any substantivity to cotton and at the most they tint the fabric."

10. After reproducing the said report, the High Court referred to Entry 155, which falls under List A of the Third Schedule of the 2003 Act covering industrial inputs and packing materials. The High Court took note of the fact that the AV falls under Entry 155(8)(d) and is essentially an industrial input. The High Court referred to the order

of Commissioner, wherein he has held that the acid violet paste is purchased by M/s. Jyothy Laboratories Ltd., a SSI unit, engaged in the manufacture of various products, including “Ujala Supreme”. While concurring with the view expressed by the Commissioner on the foundation that the finding recorded by him is consistent with the case put forth by the assessee, the High Court observed:

> “The finding of the Commissioner is consistent with the appellant's own case that industrial inputs, namely, Acid Violet Paste, is purchased by the Jyothy Laboratories and is converted into the final product, namely, "Ujala Supreme" for use as a fabric whitener. Appellant has produced several orders of the Central Excise Tribunal and Commissioners of Central Excise in support of their contention that there is no manufacture involved for payment of excise duty in the conversion of AVP into Ujala Supreme, which according to the appellant, is extremely diluted form of AVP. However, from the test report, namely, Annexure 9, extracted above, it is clear that AVP is a synthetic organic dye for fabric dyeing and is used for dyeing silk/wool and dyeing of these fabrics can take place at elevated temperature in the presence of acid only. However, the further finding of the Institute is that product sold by the appellant, namely, Ujala Supreme, cannot be used as a dye or a colouring matter. Even though the appellant contends that there is no manufacture in the conversion of Acid Violet Paste to Ujala Supreme, we find from the opinion expressed by the Institute of Chemical Technology in their above report that by virtue of the extreme dilution to below one per cent, AVP lost its identity and therefore Ujala Supreme can no longer be regarded as AVP from which it is made. In fact the test result produced by the appellant itself shows that the product has lost its property as a dyeing agent, once it is subjected to conversion process by Jyothy Laboratories to Ujala Supreme. In the impugned order, the Commissioner of Commercial Taxes, has also come to the conclusion that

> irrespective of whether there is manufacture or not for the purpose of deciding on the liability for excise duty, the product sold by the appellant, namely, Ujala Supreme can no longer be identified with the raw material, namely, AVP, from which it is made."

11. The High Court, after so stating, opined that an acid base industrial raw material cannot be used as a laundry whitener and it has to be necessarily subjected to processing or manufacture to make it fit for use as a laundry whitener which is exactly what is done by Jyothy Laboratories, the supplier of the items to the appellant and since in the process, the original item lost its identity and a new commodity with distinct composition, identity and use emerged, and accordingly rejected the appellant's contention that the item should be treated as the original commodity for classification and, therefore, the view expressed by the Commissioner deserved to be accepted.

12. The High Court, as we find, has also separately discussed with regard to "Ujala Stiff and Shine" and opined that it is a laundry item used to impart crispness and shining of clothes and in common parlance is an agent which is a substitute for starch used for giving stiffness to clothes after washing the clothes. The High Court also referred to the test report obtained by the appellant from Shriram Institute for Industrial Research. The test result which has been referred to by the High Court in respect of Ujala Stiff and Shine is as

follows:

"**S.No.**	**Tests**	**Results**
01.	Polymerized vinyl acetate content, % w/	42.98
02.	Water content, % w/w	55.80
03.	Solid content, % w/w	43.80
04.	Fragrance (Rose)	Present"

13. Taking note of the stand and stance of the appellant that no manufacturing activity is involved, the High Court observed:

> "However, appellant does not deny the contents of the product certified by the Laboratory which shows that product is different from raw material and it has a rose fragrance. We do not know on what basis the appellant can contend that an industrial raw material, namely, polymerised vinyl acetate retains its character even after subjecting it to the process, whether it be manufacture or not, leading to production of a different item with different use and purpose."

14. The High Court, as we notice, repelled the contention that the common parlance or commercial parlance test cannot be applied and identification of the products should be in accord with HSN Code No., for the said two products cannot be regarded as original items from which they are made, more so, for the purpose of payment of VAT under the 2003 Act. The High Court opined that even though the classification of items under VAT regime is also based on HSN numbers, it does not mean that the products made out of items with HSN numbers should be classified as the original items with same HSN number, and when the products made from industrial raw material are commercially different with distinct use and purpose, it

cannot be treated as the raw material from which it is made. On the said foundation it ruled that the two items can be classified under the residuary Entry 103 of SRO 82/2006. Being of this view, the High Court dismissed the appeal.

15. We have heard Mr. V. Giri, learned senior counsel, Mr. V. Lakshmi Kumaran and Mr. Alok Yadav, learned counsel for the appellants and Mr. M.T. George, learned counsel for the respondent-State.

16. To appreciate the controversy at hand, it is appropriate to refer to Section 6 of the 2003 Act. It occurs in Chapter 3 that deals with instance of levy of tax. The relevant part requisite for the present purpose reads as follows:

> "**6. Levy of tax on sale or purchase of goods.-** (1) Every dealer whose total turnover for a year is [not less than ten lakhs] rupees and every importer or casual trader or agent of a non-resident dealer, or dealer in jewellery of gold, silver and platinum group metals or silver articles or contractor or any State Government, Central Government or Government of any Union Territory or any department thereof or any local authority or any autonomous body whatever be his total turnover for the year, shall be liable to pay tax on his sales or purchases of goods as provided in this Act. The liability to pay tax shall be on the taxable turnover,-
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> (a) in the case of goods specified in the Second and Third Schedules at the rates specified therein and at all points of sale of such goods within the State;
>
> (b) [xxxx]

(c) [xxxx]

(d) in the case of goods not falling under clauses (a) or (c) at the rate of 12.5% at all points of sale of such goods within the State. Government may notify a list of goods taxable at the rate of 12.5%.

xxxx xxxx xxxx

(8) The Rules of Interpretation of the Schedules of this Act shall be as set out in the Appendix."

17. From the aforesaid, it is quite clear that the provision deals with the levy of tax on sale and purchase of goods and provides various facets. It applies to an importer, casual trader, agent of a non-resident dealer, dealer in jewellery or gold, silver & platinum group metals or silver articles or contractor of State Government or the Central Government, etc. regardless of the turnover. Under Clause (a), in respect of the goods specified in the second and Third Schedule, tax is payable at the rate specified in the said schedule. Tax is payable at the point of sale. As is seen, clause (b) stands deleted. Under Clause (d), goods not falling under Clauses (a) or (c), tax is payable at the rate of 12.5% at the point of sale within the State. The legislature has conferred the power on the Government to notify a list of goods taxable at the rate of 12.5%. Harmonious construction of Clause (a) and (d) clearly demonstrates that in case of notified goods, the rate of tax would be 12.5%. Similarly, in case of

goods not falling under Clause (a), that is Second and Third Schedule, the rate of tax would be 12.5%. It requires to be clarified here that this does not necessarily mean that exempted goods would be taxable by virtue of Clause (d).

18. Sub-Section 8 of 2003 Act provides the Rule of Interpretation of Schedules under the Act. The relevant part of the Rules of Interpretation of the Schedules is reproduced below:-

> "The commodities in the schedules are allotted with Code Numbers, which are developed by the International Customs Organisation as Harmonised System of Nomenclature (HSN) and adopted by the Customs Tariff Act, 1975. However, there are certain entries in the schedules for which HSN Numbers are not given. Those commodities which are given with HSN Number should be given the same meaning as given in the Customs Tariff Act, 1975. Those commodities, which are not given with HSN Number, should be interpreted, as the case may be, in common parlance or commercial parlance. While interpreting a commodity, if any inconsistency is observed between the meaning of a commodity without HSN Number and the meaning of a commodity with HSN Number, the commodity should be interpreted by including it in that entry which is having the HSN Number.
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> HSN Numbers are allotted in the Schedules either in four digits or in six digits or in eight digits. The four digit numbers indicate the heading in the HSN classification, six digit numbers indicate the sub-heading and the eight digit numbers indicate the specific commodity number. While interpreting the commodities in the Schedules, the following guidelines may be followed:
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> i. The Commodities which are given four digit HSN Number shall include all those commodities coming under the heading of the HSN.

ii. The commodities which are given six digit HSN Number shall include all those commodities coming under that sub-heading of the HSN.

iii. The commodities which are given eight digit HSN Number shall mean that commodity which bears that HSN Number.

iv. As an exception to the above rules, there are certain entries in the Schedules, which bear the eight digit numbers but the four digit heading numbers of such commodities are given for some other commodities mentioned elsewhere. In such cases, the four digit heading shall include only those commodities under that heading excluding that commodity for which the eight digit numbers are given. Similar cases are available in the case of six digit numbers also. In such cases the above principles shall apply mutatis mutandis.

v. Where the term 'other' is used in subentries or in sub-sub-entries, it should be construed by using the doctrine of ejusdem generis. (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).

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43. The goods given in **List A to Third Schedule as 'Industrial inputs and Packing Materials'** shall attract the rate of tax applicable to Third Schedule regardless to the purpose for which such goods have been purchased."

19. From the aforesaid rule position, it is luculent that the commodities mentioned in the schedules have been allotted code numbers developed by International Customs Organisation, which is known as Harmonised System of Nomenclature (HSN). The same has

been adopted in the Customs Tariff Act, 1975. Where the commodities have been given HSN numbers, the same meaning would be given for classification under the Customs Tariff Act, 1975. The rules accept that for certain entries, HSN numbers are not given. Where commodities are not ascribed any HSN number, they would be interpreted as understood in common or commercial parlance. In case of inconsistency between meaning of a commodity without HSN number and a commodity with HSN number, the commodity without HSN number should be interpreted by including the commodity in that entry, which has been given HSN number. Thus, primacy is given to HSN number classification and adoption/interpretation of HSN classification under the Customs Tariff Act, 1975 and any inconsistency or debate would be decided with the commodity being categorized against the HSN number. As is seen, general guidelines have been given on interpretation of four digit, six digit and eight digit HSN numbers. The rules also provided for resolution and conflict between the commodities with four digit, six digit and eight digit HSN number, when they overlap. It can be emphatically stated that the word "other" used in sub-entries or sub-sub-entries have to be construed by adopting the doctrine of *ejusdem generis*.

20. A two-Judge Bench of this Court has addressed to a dispute

pertaining to the interpretation of Rules of Interpretation as provided under the 2003 Act and HSN Code. In ***Reckitt Benckiser (India) Ltd. v. Commissioner, Commercial Taxes and others***[1], the question arose whether mosquito repellants and other items fall under Entry 44(5) of Schedule III of the 2003 Act. The Court referred to the items by enlisting the trade name, name of active ingredient, entry in relevant statutes i.e. Insecticides Act, 1968 and Drugs and Cosmetics Act, 1940 and the Licensing Authority in respect of the products, namely, Mortein coil, Mortein mats, Mortein vaporizers, Mortein Instant Cockroach Killer, Mortein Instant Flying Insect Killer, Mortein Instant All Insect Killer, Lizol disinfectant surface cleaner, Harpic toilet cleaner and Dettol. After enlisting the same, the Court referred to Section 6 of the 2003 Act, goods specified in Second and Third Schedule that are charged to duty at the rate specified therein. The two-Judge Bench also referred to the provisions in the Act about chargeability of duty when the goods do not fall within the said two schedules as per notification issued by the State Government. The controversy that arose before the Court was whether the enlisted items falls under Entry 44(5) read with Section 6(1)(a) of the 2003 Act. It was contended by the appellant that the items fell under Entry 44(5) which, at the relevant time, attracted duty at the rate of 4%

1 (2008) 15 VST 10 (SC)

whereas the stand of the Department was that the said items came under Section 6(1)(d) read with Notification No. 82/2006, Entry No. 66, which attracted the rate of duty at 12.5%. After recording the stand of the parties, the Court held:

> "We have examined the impugned judgment. In this case, we find that the High Court in the impugned judgment has failed to notice the Rules of Interpretation which require that in cases where HSN code number is indicated against the tariff item mentioned in the Third Schedule, then one has to go by the provisions of the HSN as adopted by the Customs Tariff Act, 1975. If that is the case, then, one needs to interpret the entries in the Third Schedule not only in the light of the entries in the Customs Tariff Act, 1975 but also the judgments applicable to the corresponding entries in the Customs Tariff Act."

21. Expressing the aforesaid view, the Court set aside the judgment of the High Court and remitted the matter to the High Court for fresh consideration in accordance with law. The said decision, as we understand, makes it clear that Rules of Interpretation has its own signification and one is required to go by the provision of HSN, as adopted by the Customs Tariff Act, 1975 and one has to interpret the Third Schedule not only in the light of entries in the Customs Tariff Act, 1975 but also the judgments applicable to the corresponding entries in the Customs Tariff Act.

22. In this regard, it is appropriate to refer to a pronouncement by a three-Judge Bench in ***Collector of Central Excise, Shillong v.***

Wood Craft Products Ltd.[2] In the said case, the Court referred to the Statement of Object and Reasons of the Central Excise Tariff Bill, 1985 which led to the enactment of the Central Excise Tariff Act, 1985, which indicates the pattern of the structure of the Central Excise Tariff indicated therein. The Court reproduced the Objects and Reasons of the 1985 Act. We think it apt to reproduce the relevant part of the same as follows:

> "The Technical Study Group on Central Excise Tariff, which was set up by the Government in 1984 to conduct a comprehensive inquiry into the structure of the central excise tariff has suggested the adoption of a detailed central excise tariff based broadly on the system of classification derived from the International Convention on the Harmonised Commodity Description and Coding System (Harmonised system) with such contractions or modifications thereto as are necessary to fall within the scope of the levy of central excise duty. The Group has also suggested that the new tariff should be provided for by a separate Act to be called the Central Excise Tariff Act.
>
> The Tariff suggested by the Study Group is based on an internationally accepted nomenclature, in the formulation of which all considerations, technical and legal, have been taken into account. It should, therefore, reduce disputes on account of tariff classification. Besides, since the tariff would be on the lines of the Harmonised System, it would bring about considerable alignment between the customs and central excise tariffs and thus facilitate charging of additional customs duty on imports equivalent to excise duty. Accordingly, it is proposed to specify the Central Excise Tariff suggested by the Study Group by a separate Tariff Act instead of the present system of the tariff being governed by the First Schedule to the Central Excises and Salt Act, 1944."

2 (1995) 3 SCC 454

23. After referring to the Objects and Reasons, the Court laid down thus:

> "It is significant, as expressly stated, in the Statement of Objects and Reasons, that the Central Excise Tariffs are based on the HSN and the internationally accepted nomenclature was taken into account to "reduce disputes on account of tariff classification". Accordingly, for resolving any dispute relating to tariff classification, a safe guide is the internationally accepted nomenclature emerging from the HSN. This being the expressly acknowledged basis of the structure of Central Excise Tariff in the Act and the tariff classification made therein, in case of any doubt the HSN is a safe guide for ascertaining the true meaning of any expression used in the Act. The ISI Glossary of Terms has a different purpose and, therefore, the specific purpose of tariff classification for which Central Excise Tariff Act, 1985, must be preferred, in case of any difference between the meaning of the expression given in the HSN and the meaning of that term given in the Glossary of Terms of the ISI."

From the aforesaid, it is vivid that while examining the controversy with regard to classification or entries, the aforesaid principles do form the touchstone and edifice for any determination.

24. In this context, it is worth reproducing what has been stated by a three-Judge Bench in ***O.K. Play (India) Ltd. v. Commissioner of Central Excise, Delhi III, Gurgaon***[3]:

> "Further, the scheme of the Central Excise Tariff is based on Harmonised System of Nomenclature (for short "HSN") and the explanatory notes thereto. Therefore, HSN along with the explanatory notes provides a safe guide for interpretation of an entry."

25. In the instant case, the respondents have not invoked and there

3 (2005) 2 SCC 460

is no lis as regards the applicability in Entry 27. As per the respondent and the impugned judgment, the residuary Entry, that is, Entry No. 103, is attracted. Needles to say, the residuary entry would apply only when the goods are not covered under any other Entry of the List or any other Entry in the Schedules. To elaborate, the case of the respondent is that two goods under consideration are not covered by any specified Entry in the Schedules as well as in SRO 82/2006 dated 21.01.2006. If the goods in question are covered under any of the Entries in the Schedule, Entry 103, which is the residuary Entry, would not get attracted. In such cases, the tax rate as stipulated in the Schedule, applicable to the Entries would be applicable.

26. Keeping the aforesaid principles in view, we are required to understand the Schedule and the relevant Entries therein. Prior to that we would like to refer to the findings recorded with regard to the category or classification under HSN Code in respect of two goods under the Central Excise Act.

27. Learned counsel for the appellant submits that no new product comes into existence upon the mixture of water and AVP and the product remains as AVP only, and hence, no manufacturing process is involved. It is put forth that whether the product “Ujala Supreme” which constitute dye and water, can be considered as a preparation

based on synthetic organic colouring matter classifiable under Heading 3204.90, has been examined by the Central Excise Authorities who have been administering the classification based on HSN for the few decades. It has been brought to our notice that the Excise Department has raised a demand of central excise duty in respect of the goods of the appellant by proposing to classify the product as a preparation based on synthetic organic colouring matter and the said issue was decided by the Central Excise, Customs & Gold (Control) Appellate Tribunal in ***Jyoti Laboratories v. CCE, Cochin***[4], wherein it has been held that in the process of diluting AV dye with water, no new product classifiable under the Chapter Heading 3204.90 as preparation based on synthetic organic colouring matter emerges. The said decision rendered by the Tribunal, as contended by the assessee-appellant, has not been challenged by the Central Excise Department. We have also been apprised that the matter was again raised by the Department of Excise and travelled to the Tribunal in ***Jyothy Laboratoires & Anr. v. CCE, Calicut***[5], wherein it has been ruled that the dilution undertaken by the company does not result in the emergence of new product and that the diluted product in question would continue to

4 1994 (72) ELT 669
5 (2007) (78) RLT 276, CESTAT Bangalore

be classifiable under Chapter Heading 3204.12.94. The said decision of the Tribunal has also gone unassailed and has been accepted by the authorities all over the country.

28. It is an admitted fact that Jyothy Laboratories purchases central excise duty paid AVP classifiable under the Heading 3204.12.94 and thereafter, the AVP is diluted in water and filled in plastic container and then sold under the brand name of 'Ujala'. As far as "Ujala Supreme" is concerned, it is urged that it is nothing but a diluted form of AVP. The AVP is merely diluted to create Ujala Supreme in the form of mathematical equation. Learned counsel for the appellant has referred us to report dated 30.8.2006 of the Institute of Chemical Technology, Matunga, Mumbai which has stated that the chemical composition of AVP and Ujala are the same except for the dilution in Ujala. The relevant part of the said report reads as follows:

> "The Acid Violet Paste (referred as "AVP" hereafter) supplied to us confirms to Acid Violet 49, a synthetic organic dye classified into acid dye class which is used for the colouration of silk / wool at elevated temperatures in the presence of acid. "AVP" is uniform and having standard strength which is formulated and prepared as ready for use. The "AVP" as well as "Ujala" purchased from the market are subjected to instrumental analysis (High Performance Thin Layer Chromatography) and the results are observed as below.
>
> 1. The Chemical composition of "AVP" and "Ujala" are the same except for the dilution in "Ujala".

2. It can be observed from the chromatogram that "Ujala" is a heavily diluted form of AVP with water.

3. As such "Ujala" cannot be used as a dye or a colouring matter as it is.

4. From the technical literature it can be understood that diluted acid violet 49 is used in the fabric finishing industries for imparting brightness to white fabrics.

(The mechanism being the fabric absorbs all the colours in the visible light and transmits the bluish / purplish tint)

As per technical report and the HPTLC report, it can be conclusively said that Ujala is nothing but a diluted form of Acid Violet Dye.
The observations of the HPTLC analysis are as follows:

d. All the components present in diluted sample of AVP are also present in Ujala sample.

e. No additional components are present in Ujala sample.

f. The diluted AVP samples and the Ujala sample's spectral scans are super imposable and match exactly, which confirms that Ujala is a diluted form of AVP and chemically they both are identical.

From the above analytical and technical data, it can be concluded that "Ujala" is only a diluted form of Acid Violet 49 with water, which has the inherent characteristics of brightening clothes and does not contain any other additives or optical brightening agents. The brightness of the fabric is increased because it absorbs all the colours in the visible light and transmits the bluish / purplish tint, thus hiding the yellowing of the fabrics."

29. Referring to the said report, it is submitted that when the 2003 Act has classified AVP under Entry 155(8)(d) and has classified it as

equivalent to HSN Code No. 3204.12.94, it has to be put under that classification. As far as "Ujala Stiff and Shine" is concerned, it is the stand of the assessee that it is only a diluted PVA and Jyothy Laboratories purchases PVA, which is an aqueous dispersion, from M/s. Somnath Chemicals which sells it under the brand name PA3339, classifying the product under Chapter Heading 3905.12.90 of Central Excise Tariff Act, 1985 (for short, "the 1985 Act"). To bolster the said stand reliance has been placed on a Test Certificate of GEO CHEM Laboratories P. Ltd., Mumbai which states that "Ujala Stiff and Shine" is PVA. A similar test certificate from Shriram Institute for Industrial Research has also been brought on record. The said Institute has tested samples collected from open market in Kerala and from the Kerala sales depot of Jyothy Laboratories Ltd. and the test report has certified that the product to be containing solid and water content of 43.87% and 55.78% respectively in the former and 43.80% and 55.80% in the latter case. It is further stated that the solid content in both the cases have been tested and certified to contain PVA in the ratio of 42.94 out of 43.87 and 42.98 out of 43.80 respectively. In other words, the percentage of PVA in the solid content is more than 98%. It is also noticeable from the report that there is presence of rose fragrance. It is further the stand of the

appellant that Jyothy Laboratories Ltd. does not add any ingredient to the PVA and, therefore, the rose fragrance is inherent in the PVA purchased by it.

30. At this stage, it is pertinent to note that Chapter Heading 3905 of HSN reads "Polymers of Vinyl acetate or of other vinyl esters, in primary forms; other vinyl polymers in primary forms". Chapter Note 6 of Chapter 39 of HSN/Customs Tariff/Excise Tariff states that "the expression 'primary forms' applies only to:

> "(a) Liquids and pastes, including dispersions (emulsions and suspension) and solutions,
>
> (b) Blocks of irregular shape, lumps, powders (including moulding powders), granules, flakes and similar bulk forms."

31. On the aforesaid basis, it is claimed that "Ujala Stiff and Shine" is a liquid form and is covered under primary form. Reference has been made to Heading 3905 of the Tariff that reads as follows:

"3905	Polymers of vinyl acetate or of other vinyl esters, in primary forms; other vinyl polymers in primary forms.
	- Poly (vinyl acetate):
3905 12	- In aqueous dispersion:
3905 12 10	-- Poly (vinyl acetate) (PVA), moulding material
3905 12 20	-- Poly (vinyl acetate) resins
3905 12 90	--- Other"

32. A comparison has been made between the said tariff and Entry 118(5) of List A of the Third Schedule of the 2003 Act which is as

follows:

> "Polymers of vinyl acetate or of other vinyl esters, in primary forms, other vinyl polymers in primary forms and gives the HSN code as 3905."

33. We have referred to the same as the learned counsel for the appellant has strenuously urged that HSN code has to be given necessitous acceptation as it is the intendment of the legislature. The Rules of Interpretation of the schedules have stipulated that the commodities which are given four digit HSN number shall include all those commodities under that Heading of the HSN which would mean that all the items listed under Chapter Heading 3905 of the Tariff are covered by the said Entry. It is contended that once it has been held by the CESTAT that there is no chemical change brought about in a process and if the product at the starting and the terminal points of the process remains the same, the activity would not amount to manufacture, as the essential character of product remains constant.

34. In this regard, we may refer with profit to a two-Judge Bench decision in ***Commissioner of C.Ex., Cochin v. Mannampalakkal Rubber Latex Works***[6] In the said case, the assessee was engaged in the manufacture of Latex (Rubber) based Adhesive with brand names Superset (LC) and Superset (LB). The claim of the Department was that Latex based Adhesive manufactured by the assessee falls under

6 2007 (217) ELT 161 (SC)

tariff heading '35.06' as it is being sold as an adhesive to the leather footwear manufacturers. Reliance was placed on the process of manufacturing for coming to the conclusion that tariff heading 35.06 is applicable. In the said case, the Court referred to the tariff heading 35.06 which falls under Chapter 35 with reference to enzymes, modified starches: glue and albuminoidal substances, whereas tariff heading 40.01 falls under Chapter 40 which refers to 'rubber and articles thereof'. The tribunal referred to Note 5(b) of Chapter 40 and eventually held thus:

> "Reading Note 5(b), it becomes clear that the test to distinguish rubber based adhesives and non-rubber based adhesives or other adhesives is the test of composition and not the test of end-user. Generally, in matters of classification "composition test" is an important test and "end-user test" would apply only if the entry say so. Applying Note 5(b) and keeping in mind the distinction between rubber adhesive and other adhesives, we are of the view that tariff heading 40.01 is applicable to the facts of the present case. Applying the composition test, we also find that the rubber content in the product in question is above 90 per cent.
>
> For the aforestated reasons, we are of the view that Latex and Adhesives manufactured by the assessee falls under heading 40.01 and not under heading 35.06."

35. Learned counsel for the appellant has drawn inspiration from the said decision to show that the case at hand, the composition test is the important one and not the end-user test. Be it stated, Note 5(b) provided about rubber or mixture of rubber retaining its essential

character as a raw material. Learned counsel for the appellant has placed reliance on ***Jyoti Laboratories*** (supra), wherein the issue was that the product manufactured under the brand name Ujala was classified differently by the assessee and the revenue. The Tribunal posed two relevant questions, namely, (i) whether there is a process of manufacture and a new excisable goods had arisen in the preparation of the product Ujala and (ii) if so, what is the correct classification? Thereafter, the Court referred to the opinion of the Chemical Examiner, wherein it has been stated thus:

> "The entire method of manufacturing was also verified. The factory is getting the Acid Violet and Fluorescent Whitening agent from Bombay. The fluorescent whitening agent is nothing but Ranipal as per the packing list on the tin.
>
> Factory is making the Ujala by simply mixing these three items, Acid violet, ultra marine blue, fluorescent whitening agent in water heating them to a particular temperature and then filter this solution and bottling them in small packings and packing them in paper cartons for marketing, as such, there is no machinery is used for the production. All the process is done by manual labour only.
>
> Hence, in my opinion, no new product is emerged by this process, only three colouring matters mixed together in a particular proportion for colouring the fabric."

On the aforesaid basis, it held thus:

> "Therefore, on the basis of the technical opinion and the case law cited above, we have to uphold the contention of the assessee that there is no manufacture on the addition, and mixing of Ranipal, Ultramarine blue in the liquid Acid

> violet dye and there is no new product emerging from such a process."

36. Be it noted, this view expressed by one of the member was differed with another member, but the third member, relying on the report of the Chemical Examiner, who has stated that Ujala is made simply by mixing acid violet, Ranipal and ultramarine blue in water heating them to a particular temperature and filtering this solution and bottling in small packing and packing them in paper cartons for marketing. The chemical examiner observed that only three colouring matters mixed together in a particular proportion for colouring the fabric. The learned Member thereafter stated thus:

> "It is seen that even according to the subsequent memorandum for changing the classification issued by the Collector on 31.5.1991, the admitted position is acid violet received by the appellants is standardized. Therefore, it is very clear that there is no conversion in this case of unformulated, unstandardised or unprepared form into their formulated, standardized or prepared forms ready for use in the process of dyeing. When this is so, it cannot be held that there is a process of manufacture in the production of 'Ujala'. The chemical examiner's report is to the effect that it is a physical mixture of the ingredients in boiling water which report has been given after study of the manufacturing process." [Emphasis added]

37. It is apt to note here that the majority opined that the Chemical Examiner's opinion is in accordance with the Tariff Ruling of the Board. These authorities fundamentally relate to the issue that there

has been really no manufacture process for the purpose of classification. That apart we find from the test reports that there is only dilution in water and needless to emphasize the same does amount to or result in manufacture and hence, no new product emerges. Therefore the common parlance would come into play.

38. From the aforesaid discussion, it is clear as crystal that two goods/products have been held to be covered under the HSN Code 3905, and HSN Code 3204.12.94 and hence, there can be no shadow of doubt that the said entries fall under entry numbers 155(8)(d) and 118(5) of the list "A" of Third Schedule of the 2003 Act covering industrial inputs and packaging materials, but that would not be material and relevant regard being had to the rules of interpretation which are applicable. The subject matter of the list will not fall under residuary entry 103 in SRO 82/2006 dated 21.01.2006, if the goods in question fall in any entry of any of the schedule. That is what is conveyed by the language employed in Entry No. 103. The said Entry, as we find, does not stipulate or carves out any exception in respect of list "A" to the Third Schedule. That being the position, once goods fall under any of the HSN classification, that is, the goods/commodities that are included in list "A" to the Third Schedule, entry 103, which is residuary in nature, would not get attracted.

39. The submissions of learned counsel for the State that the decisions under the Excise Act would have no play, for they deal with the issue of the manufacture, does not commend acceptance. The High Court has elaborately dwelled upon the issue of manufacture. We have noticed the judgments rendered by the CESTAT there is no manufacturing. It is pertinent to state here that the question of manufacture is not relevant for the purposes of 2003 Act. What is really relevant is the classification based upon the HSN number. The decisions rendered by the CESTAT have decided on the classification which is founded upon the HSN number. It has been laid down that after devolution with water the goods continue to remain classified under the same HSN number. This means that the goods remain in list "A" of the Third Schedule. It may be noted that the position would have been totally different had the goods in question been separately and specifically itemized in SRO number 82/ 2006 dated 21st January 2006. The goods which are specifically mentioned in any of the entries of the said SRO, would be chargeable to tax @ 12.5%. But that is not the lis here, for the Revenue has included the goods in the residuary Entry 103 and the said entry, by no stretch of reasoning, can be made applicable.

40. The High Court, we are disposed to think, has missed the issue

in entirety and, therefore, we are obliged to dislodge the impugned judgment and orders. However, if any assessee-appellant has paid the amount of VAT to the State Government, they will not be entitled to get any refund of the said amount.

41. Consequently, the appeals are allowed and the judgment and orders are set aside with the stipulation that none of the assessee-appellant would be entitled to refund. However, in the facts and circumstances of the case, there shall be no order as to costs.

.....J.
[Dipak Misra]

.....J.
[Abhay Manohar Sapre]

New Delhi
March 18, 2015

ITEM NO.1A COURT NO.5 SECTION IIIA

S U P R E M E C O U R T O F I N D I A
RECORD OF PROCEEDINGS

Civil Appeal No(s). 1440/2010

M/S M.P.AGENCIES **Appellant(s)**

VERSUS

STATE OF KERALA **Respondent(s)**

WITH
SLP(C) No. 28874/2011
C.A. No. 4565/2012
C.A. No. 4815-4818/2012
C.A. No. 2869-2873/2015
C.A. No. 4610-4616/2012
C.A. No. 4397-4409/2012

Date : 18/03/2015 This appeal was called on for judgment today.

For Appellant(s) **Mr. V. Lakshmi Kumaran, Adv.**
Mr. Alok Yadav, Adv.
Mr. M. P. Devanath, Adv.

SLP 11642-46/14 **Mr. V. Giri, Sr. Adv.**
Mr. Ritin Rai, Adv.
Mrs. Sadhvi Mohindru, Adv.
Mr. V.K. Monga,Adv.
Mr. Siddhartha Jha, Adv.

For Respondent(s) **Mr. M. T. George, Adv.**
Ms. Kavitha T., Adv.

Hon'ble Mr. Justice Dipak Misra pronounced the judgment of the Bench comprising His Lordship and Hon'ble Mr. Justice Abhay Manohar Sapre.

The appeals are allowed in terms of the signed reportable judgment.

(Gulshan Kumar Arora) **(H.S. Paresher)**
Court Master **Court Master**

(Signed reportable judgment is placed on the file)