

(2008) 03 KL CK 0023

In the High Court Of Kerala

Case No : S.T. Rev. No's. 322, 323, 325 and connected cases of 2004

Kanholy Ramankutty Nair

APPELLANT

Vs

State of Kerala

RESPONDENT

Date of Decision : 31-03-2008

Acts Referred:

Central Sales Tax Act, 1956 — Section 14, 14(1), 15, 2

Kerala General Sales Tax Act, 1963 — Section 5, 5(1), 5(2)

Citation : (2008) 2 ILR (Ker) 607 : (2008) 2 KLJ 267 : (2008) 17 VST 386

Hon'ble Judges : H.L. Dattu, C.J.; K.M. Joseph, J

Bench : Division Bench

Advocate : P. Raghunath, P. Ramachandran and Premjit Nagendran, for the Appellant; Mohammed Rafiq, GP, for the Respondent

Judgement

H.L. Dattu, C.J.—In all these tax revision cases, the one and only question that arises for our consideration and decision is, whether Maize and flattened Maize (Maize Poha) are one and the same commodity so as to be covered by the term "maize" under the heading. "cereal" in Entry No. 9 of Second Schedule to Kerala General Sales Tax Act or a different commodity liable to be assessed as an unclassified item taxable under the residuary entry.

These revision petitions pertain to the orders assessment passed by the assessing authority for the assessment years 1991-92, 1997-98, 1998-99, 1999-2000 and 2000-01.

2. The assessments had been completed by the assessing authority for the assessment year 1991-92. The assessing authority was of the view, that maize and maize poha are commercially different commodities and therefore, they are not covered by the term maize that find a place under cereal in Entry 9 of Second Schedule to K.G.S.T. Act. The first appellate authority had confirmed the findings and conclusions reached by the assessing authority. In the appeal filed by the assessee, the Kerala Sales Tax Appellate Tribunal Kozhikode Bench in T.A. No. 99 of 1996 had taken the view that maize and maize poha are one and the

same commodity and therefore, they are covered by the term "maize" that find a place under cereal in Entry 9 of Second Schedule to KGST Act. Aggrieved by the said order passed by the Tribunal, the State had carried the matter in Revision Petition No. 302 of 2000 before this Court.

3. For the assessment years 1997-98, 1998-99 and 1999-2000 in the appeals filed by the State Government in T.A. Nos. 156.157 and 158 of 2001, the Tribunal had concluded that Maize and Maize Poha are commercially different commodities and therefore they would not be covered by the term maize under the heading cereal in Entry 9 of Second Schedule to KGST Act. The assessee being aggrieved by the orders passes by the Tribunal had filed Tax Revision Cases in T.R.C. Nos. 294, 295 and 296 of 2002 before this Court. This Court by common judgment dated 6th November, 2002 in T.R.C. Nos. 294, 295, 296 of 2002 and 302 of 2000 has set aside the orders passed by the Tribunal and has remanded the matter to the Tribunal for fresh consideration of the matter in the light of the decision rendered by the Apex Court and also the catena of decisions rendered by this Court. While doing so, the Division Bench has observed as under:

We have perused the orders of the assessing authority and of the appellate authorities. We find that all the authorities have decided the issue one way or other without considering the factual situation as to whether any process has been employed by the revision petitioner in converting maize into flattened maize and, if so, as to whether its character and use have changed in any manner and further as to whether this item is known by the buyer and in common parlance as a different commodity. All these are matters for evidence which has to be adduced by the parties. It is without going into all the factors mentioned above, all the authorities including the Tribunal have taken the view one way or the other. According to us, the question as to whether flattened maize dealt with by the assessee for all these years is the same as maize will depend on various factors such as the process employed by the revision petitioner in converting the maize into flattened maize, the character and use of the product, viz., flattened maize and as to whether flattened maize is known in common parlance and in commercial world as a different commodity from maize. Since the item maize is occurring in the second schedule to the Act, the aforesaid aspects have to be considered in the background of the provisions of Section 14 of the Central Sales Tax Act and also keeping in mind the principles laid down by the Supreme Court in Rajasthan Flour Mills case mentioned supra and other decisions on the point.

7. In these circumstances, we are of the view that the matter must be considered by the Tribunal afresh in the light of the decisions of the Supreme Court and in the light of the observations made in this judgment. We accordingly set aside the common order of the Tribunal for all the three assessment years and remit the matter for fresh consideration in the light of the principles laid down by the Supreme Court in Rajasthan Flour Mills Association v. State of

Rajasthan (1993) 91 STC 408 and other cases mentioned in this judgment and in the light of the observations made in this judgment. If the Tribunal feels that the matter must go back to the assessing authority for taking further evidence in this matter, certainly the Tribunal is free to do so.

4. The Tribunal after such remand has allowed the State's Appeal and has rejected the cross objections filed by the assessee. The finding of the Tribunal is that Maize and Maize Poha are commercially different commodities and in the absence of a specific entry in the Schedule, the assessing authority was justified in classifying the same under the residuary entry, i.e. Entry of First Schedule. The finding of the Tribunal in this regard is as under:

We have considered the arguments of both sides and also perused the assessment records. The only question to be decided in this appeal is whether kakai powha is a declared good falling under entry 9 of the second schedule to the KGST Act. It is true that there were conflicting decisions on the same issue by different benches of the Tribunal. The Hon'ble High Court of Kerala set aside the earlier order of the Tribunal and remanded the issue back to the Tribunal with specific direction to reconsider the entire issue in the light of the decision of the Hon'ble Supreme Court of India in Rajasthan Flour Mills case. Accordingly, the matter was considered in detail in T.A. Nos. 156, 157, 158/ 2002 dated 6-7-2004 (Helmi Enterprises) and elaborately discussed in order dated 6-7-04. It was found that a manufacturing process is involved while converting maize into maize poha. In other words, maize is consumed while manufacturing maize poha. Maize loses its identity while converting into poha. The manufactured produce differs in its size, shape and structure. Further the product manufactured has a higher utility than the raw material consumed. Applying the ratio of the decision of the Hon'ble Supreme Court in Rajasthan Flour Mills case, this Tribunal held that maize and maize poha are different commodities and a process of manufacture is involved while converting maize into poha. Hence maize poha is not a commodity declared u/s 14 and 15 of the CST Act. In the absence of specific entry in the schedule, the assessing authority is justified in classifying the same under the residuary entry, i.e. Entry 177 of First Schedule. We therefore, set aside the order of the Deputy Commissioner (Appeals) in STA 370/2002 dated 31-12-2002.

5. Aggrieved by the aforesaid finding and condition reached by the Tribunal, the assessee is before us in these tax revision cases.

The assessee has framed the following questions of law for our consideration and decision. They are:

(i) Is not the order of the Appellate Tribunal improper and unsustainable in the facts and circumstances of the case? Is not the order of the Appellate Tribunal vitiated by a perverse appreciation of evidence.

(ii) Whether on the facts and in the circumstances of the case, the Appellate Tribunal is justified in holding that maize and maize poha are different commodities and that maize poha is not a commodity declared u/s 14 and 15 of

the CST Act especially when maize cannot be consumed as such?

(iii) Whether on the facts and circumstances of the case, the Appellate Tribunal is justified in holding that maize poha does not come within the entry maize under entry No. 9 of the second schedule to the KGST Act especially in the light of the decision of the Allahabad High Court in Commissioner of Sales Tax v. Anand Ram Hari Ram 1982 UPTC 987 confirmed by the Hon''ble Supreme Court in SLP No. 11915 of 1982 that maize poha is a food grain cereal.?

(iv) Whether the Appellate Tribunal justified in holding that maize and maize poha are different commodity since no manufacturing process is involved while converting maize into maize poha and as the only process involved is steaming and flattening on maize? Is not the approach adopted by the tribunal in coming to the conclusion that manufacturing process is involved in converting maize into maize poha and that maize and maize poha are different commodities, unsustainable in law in the light of the judgments of the Hon''ble Supreme Court in 41 STC 394, 46 STC 63, 69 STC 11

(v) In a taxing matter, when two views are possible, is not the tribunal bound to take a view which is favourable to the assessee in the light of various decisions of the Apex Court and this Hon''ble Court?

(vi) Whether the Appellate Tribunal is justified in unsetting the settled position of law by discarding the dictum laid down by the Apex Court and various High Courts?

(viii) Is the revenue justified in levying tax on the sale of maize poha at different rates for different dealers in different parts of the State and also at different rates for the same dealer in respect of different assessment years?

(ix) Is not the tribunal bound by its own decision rendered earlier for another assessment year on the very same question?

(xi) Is the tribunal justified is not following the decision of another bench of the tribunal and also of the very same bench on the very same question?

6. At the time of hearing of these revision petitions, the learned Counsel for the assessee would submit, that, the finding of the Tribunal that maize and maize poha are different commodities and a process of manufacture is involved while converting maize into maize poha is without any factual basis. It is further contended that petitioner used to effect purchase of maize poha and the same is sold without undergoing any further processing.

7. Learned Counsel for the petitioner would further contend that maize is converted into maize poha by employing some labour work, i.e. steaming and flattening, without adding any salt, sugar or any other ingredients for its processing. The maize poha obtained is not cooked and cannot be directly used as food and further frying process is necessary before its use. Therefore, maize poha retains identity as cereal and is not different from maize. Learned Counsel

also relies upon the test result of maize manufactured by M/s. Miki Food Products, Camby issued by the Assistant Collector (Tech) Central Excise, Ahmedabad wherein it is stated, that maize poha does not possess any essential characteristic of prepared food as maize corn flakes and is not edible. In view of the report by the technical expert, learned Counsel contends that maize and maize poha are one and the same commodity and therefore, requires to be taxed at the rate of 1% treating it as a cereal falling under entry 9 of the Second Schedule to KGST Act. Learned Counsel further submits that the view of the Tribunal is that a manufacturing process is involved while converting maize into maize poha and this finding of the Tribunal, according to the learned Counsel, is contrary to the decision of the Apex Court in the case of board of Revenue (Taxes), Ernakulam v. Plo Food Packers 46 STC 63, wherein the apex court has held that manufacture implies a change, but every change is not manufacture, and yet every change in an article is the result of treatment, labour and manipulation, but something more is necessary. In the said decision, it is further stated that, there must be transformation, a new and different article must emerge having a distinctive name, character or use. Therefore, it is stated that the Tribunal ought to have concluded that maize poha has the same characteristics of maize, and therefore, they are not commercially different commodities.

8. The learned Counsel also relies upon the decision of the West Bengal Taxation Tribunal in the case of Ram Bilash Agarwal v. C.T.O., Durgapr Range and Ors. (2004) 137 STC 510. Reliance is also placed on the decision of the Uttar Pradesh High Court in the case of Commissioner of Sales Tax, U.P., Lucknow v. Anand Ram Hari Ram 1982 UPTC 987 and the order passed by the Supreme Court in rejecting the SLP filed by the State.

9. Lastly, it is contended that the Tribunal merely relying on the decision of the Apex Court in the case of Rajasthan Flour Mills Association and Anr. v. State of Rajasthan 91 STC 408, could not have come to the conclusion that maize and maize poha are commercially different commodities.

10. Per contra, Mr. Mohammed Rafiq, appearing for the Revenue would submit that in view of the law laid down by the Apex Court in the case of Rajasthan Flour Mills Association and Anr. v. State of Rajasthan 91 STC 408, State of Tamil Nadu v. Pyare Lal Malhotra 37 STC 319, State of Karnataka v. B. Raghurama Shetty 47 STC 369; Bangalore Wood Industries v. Asst. Commissioner of Commercial Taxes 92 STC 603; Sterling Foods v. The State of Karnataka and Anr. 63 STC 239; and Aspinwall and Co. Ltd. v. Commissioner of Income Tax 125 STC 101, there is essential difference and distinction between maize and maize poha and therefore, the Tribunal was justified in treating maize poha as an item which would not come within the expression maize that finds a place in entry 9 of Second Schedule to the Act, and was justified in directing the assessing authority to treat the said commodity under the residuary entry and tax the same at the rate of 12.5%.

11. The one and only question that arises for our consideration and decision, as we have already noticed is, whether the Sales Tax Tribunal was justified in holding that Maize and Maize Poha are commercially different commodities and therefore it would not come under the heading "cereal" under Entry 9 of second schedule to KGST Act.

12. Section 5 of KGST Act is the charging provision. Sub-section (1) lays down that every dealer, other than a casual trader or agent of non-resident dealer, whose total turnover is not less than two lakhs and every casual trader or agent of a non-resident dealer whatever may be his total turnover for the year shall pay tax on his taxable turnover for that year. Clause (i) of Sub-section (1) of Section 5 lays down that in the case of goods specified in first and second schedule to the Act, levy of tax shall be at the rate or rates specified therein and only at the points specified against such goods. Second Schedule to KGST Act enumerates declared goods in respect of which a single point of tax is leviable under Sub-section (1) or Sub-section (2) of Section 5 of the Act. Entry 9 of second schedule to the Act speaks of cereals. The said entry is as under;

SI.	Description of the goods	Point of levy	Rate of tax
	Cereals, that is to say, Paddy, rice, jowar or in the State by a dealer	At the point of first sale	9 milo, bajra, maize, who is liable to tax under ragi, kadon, kutki and Section 5 barli

13. The legislature has enumerated the goods that would fall under entry cereals. Immediately after the word cereals, the legislature has used the expression "that is to say". This expression had come up for consideration and interpretation in the case of *State of Tamil Nadu v. Pyarelal Malhotra* 37 STC 319, wherein it is stated that the said expression is generally employed to make clear and fix the meaning of what is to be explained or defined, and not to amplify the meaning, for which purpose the word "includes" is generally employed. In *Sait Rikhaji Furtarnal and another Vs. State of Andhra Pradesh*, , the apex court has observed that the expression "that is to say" is exhaustive and not merely illustrative. In *Rajasthan Roller Flour Mills Association v. State of Rajasthan* (1993) 91 STC 408, the Supreme Court has observed, that the expression "that is to say" is employed in Section 14(1) of the CST Act, to make clear and fix the meaning of what is to be explained or defined. Such words are not used as a rule to amplify a meaning and in the context of single point sale tax, the expression is meant to exhaustively enumerate the kind of goods in a given list.

14. From the decisions cited supra, what can be deduced is, the words "that is to say" are the words of limitation confined to specified items only. They are words of illustration, and the instances that follow operate as a guide for interpretation.

15. The Apex Court while explaining the concept of single point tax in the case of *State of Tamil Nadu Vs. Pyare Lal Malhotra and Others*, , has stated that sales

tax law is intended to tax sales of different commodities and not to tax the production or manufacture of particular substance out of which these commodities may have been made. As soon as separate commercial commodities are made or come in to existence, they become separately taxable goods or entities for purposes of sales tax and so long as they retain their identity as goods of a particular type, they cannot be taxed again in a series of sales. In such cases, where one commercial commodity is transformed into another, it becomes separate for purposes of sales tax. The object of single point of taxation is the commercial commodity of each variety and not the sale of the substance out of which it is to be made.

The Court has further observed,

It is true that the question whether the goods to be taxed have been subjected to a manufacturing process so as to produce a new marketable commodity, is the decisive test in determining whether an excise duty is leviable or not on certain goods. No doubt, in the law dealing with the sales tax, the taxable event is the same and not the manufacture of goods. Nevertheless, if the question is whether a new commercial commodity has come into existence or not, so that its sale is a new taxable event, in the sales tax law, it may also become necessary to consider whether a manufacturing process, which has altered the identity of the commercial commodity, has taken place. The law of sale tax is also concerned with the "goods" of various descriptions. It, therefore, becomes necessary to determine when they ceased to be goods of one taxable description and becomes those of a commercially different category and description.

16. The Central Sales Tax Act is an Act to formulate the principles for determining when a sale or purchase of goods takes place in the course of inter-State trade or commerce or outside a State or in the course of import into or export from India, to provide for levy, collection and distribution of taxes on the sales of goods etc. One of the purposes sought to be achieved by this Act is to specify the restrictions and conditions to which State laws imposing taxes on the sale or purchase of certain goods, which are declared to be of special importance. The meaning of the expression "declared goods" is defined in Section 2(c) of the Act, to mean goods declared u/s 14 to be of special importance in interstate trade or commerce. Section 14 of the Act enumerates the various goods which are declared to be of special importance in inter-State trade or commerce. Section 15 of the Act imposed restrictions and conditions in regard to tax on sale or purchase of declared goods within the State.

17. The Sales Tax Appellate Tribunal, while allowing the State's appeal has primarily relied on the ratio of the decision in Rajasthan Flour Mills" case for coming to the conclusion that Maize and Maize Poha are commercially different commodity.

18. In Rajasthan Flour Mills" case, the question before the Apex Court was whether the expression "wheat" in Section 14(1)(iii) of the Central Sales Tax Act,

1956, includes flour, maida and suji. The court held that, flour, maida and suji derived from wheat are not "wheat" within the meaning of Section 14(1)(iii) as they are different and distinct goods from wheat and therefore they are not declared goods. While saying so, the court has observed, that, in taxing matters one has ultimately to take a common sense view of the matter. The terms as understood in the commercial sense and with reference to their use must be kept in view, in order that a correct conclusion may be reached. Although "wheat" is a cereal, but commodities like atta (flour) of Maida or suji obtained by subjecting wheat to a different process are commercial commodities different from wheat as a cereal does. The restrictions of Section 15 must be limited to the goods specifically mentioned in Section 14 of the Act.

19. In *Gopuram Gram Mill Co. v. State of Andhra Pradesh* (1994) 95 STC 358, the question before the court was whether gram or gulab gram which has undergone the process of parching or frying would be a gram or gulab gram as specified in sub item (i) of item (vi-a) of Section 14 of the Central Sales Tax Act, 1956. The Apex Court following the observation made in *Rajasthan Flour Mills* case has stated that item (vi-a) of Section 14 of the Central Sales Tax Act, 1956 refers to "pulses" that is to say, and that expression that is to say has been held by this Court in *Rajasthan Flour Mills* case to mean, "to make in clear and fix the meaning of what is to be explained or defined. The words, it was said, are not used as a rule to amplify the meaning and in the context of a single point sales tax, they exhaustively enumerate the kind of goods in a given list. That judgment also holds that the provisions of Section 14 and 15 of the Central Act, being restrictions upon the plenary powers of the State legislature to levy tax on the sale or purchase of goods, must be construed strictly. In other words, the restriction must be limited to the goods expressly mentioned and nothing more must be read into except what is clearly stated. The court has further observed, sub item (i) of item(vi-a) of Section 14 refers to gram or gulab gram (*cicerarietinum* L.) it seems to us, in the first place, that gram or gulab gram which has undergone the process of parching or frying would no longer be gram to which the botanical term specified can be applied. Next, Section 15(d) specifically amplifies the context of sub-item (i) of item (vi-a) of Section 14 to pulses referred to therein" whether whole or separate, and whether with or without husk." In express terms, therefore, the restriction is limited only to whole or separated gram or gulab gram and gram or gulab with husk or dehusked. Section 15 being so specific, it is impermissible to read it as applicable to gram which has been parched or fried. Lastly, the gram having undergone the process of parching or frying would appear to have become a new and distinct commodity,

(underlining by us).

20. The Apex Court in *Rajasthan Flour Mills* case has distinguished the dicta laid down in *alladi Venkateswarly v. Government of A.P.*(1978) 41 STC 394 . The court has observed thus:

Parched rice or puffed rice were not mentioned under any of the entries in any of the Schedule to the Act. According to the scheme of the Andhra Pradesh General Sales Tax Act, as it then obtained, goods not falling in any of the schedules to the Act were treated as general goods and were subject to multipoint tax at 4 per cent or 5 per cent, as the case may be, u/s 5(1) of the Act. The High Court had taken the view that parched rice and puffed rice were different commodities and were taxable as such. The question arising for consideration before the Supreme Court was posed by the Bench in the following items:

"The question, therefore, before us is whether "rice", which is obtained from paddy, already taxed under item 8 of the Second Schedule, ceases to be "rice" falling prima facie under item 66(b) as rice on which a tax was already paid when it was in the form of paddy? Does heating or parching only to make it edible have that effect?

It was answered in the following words;

It is clear that there is a distinction between "paddy; as found in item 8 of the Second Schedule, and "rice", as mentioned under item 66 of the First Schedule. Apparently, the removal of the husk makes this difference. It is true that the " First Schedule, which contains as-many as 136 items, includes a number of separate fairly detailed entries, entry 58 is for bran or husk of "rice" and Entry 59 is for "deoiled bran of rice". It appears, therefore, that "rice in husk" is paddy. When it is removed from husk, the husk and rice become separately taxable. But, there are no separate entries for rice and rice reduced into an edible form by heating or parching without any addition of ingredients or appreciable changes in chemical composition. The term "rice" is wide enough to include rice in its various forms whether edible or inedible. Rice in the form of grain is not edible. Parched rice and puffed rice are edible. But, the entry "rice" seems to us to cover both forms of rice. At any rate, it is wide enough to cover them.

The Bench also relied upon the earlier decision in *Tungabhadra Industries Ltd. Vs. The Commercial Tax Officer, Kurnool*, in support of its opinion. It is thus clear that what influenced the decision mainly was the fact that parched rice and puffed rice were not mentioned as separate commodities under any other item in any of the Schedules to the Act. It was, therefore, held that the term "rice" in Entry 66(b) includes rice in all its forms. The High Courts while applying the principle of this judgment to the question at issue herein ignored the fact that the said decision did not deal with the meaning and ambit of the several sub-clauses in Clause (i) of Section 14 of the Central Sales Tax Act and also the fact that the Andhra Pradesh Act and also the fact that the Andhra Pradesh Act did not place parched rice and puffed rice under separate entries in any of the Schedules to the Act. In our opinion, the principle of the side decision has no application in the context and scheme of Sections 14 and 15.

(Emphasis supplied by us)

21. In *Alladi Venkateswarlu v. Government of A.P.* (1978) 41 STC 394, the Supreme Court had laid down in definite terms that, "a taxing statute is not to be interpreted in such a manner so as to impute an intention of the legislature to go on taxing what is virtually the same product in different forms over and over again. Such a result would be contrary to basic axioms of taxation unless the language of the taxing statute was absolutely clear, it should not be given an obviously unfair interpretation in favour of such levy."

22. The Apex Court has further stated that, where the law requires a single point levy of sales tax on a particular sale point in the series of sales of a particular commodity, it will be inappropriate to the taxing authority to attempt a circumlocution of the law by bringing up an unfair interpretation of the provisions. If the single point tax commodity has already suffered tax at any earlier point of sale, its subsequent sales are not again to be levied with tax so far as it remains the same commodity. However, if by any processing operation, the identity of the commodity undergoes any change, the plea of single point tax does not bar further levy on the so processed product. Therefore, it becomes necessary to determine when the goods ceased to be goods of one taxable description and becomes those of a commercially different category and description. What is necessary for the benefit of a single point taxation is either the retention of the identity of the goods or its identity, as a commercial commodity in trade.

23. In the instant revision petitions, we are asked to give an answer, whether Maize and Maize Poha are one and the same commodity or different commercial commodities as concluded by the Tribunal. It is the contention of the learned Counsel for the assessee that the flattened maize (maize poha) is the same as Maize and therefore liable to be taxed at the rate of 1% during the relevant assessment years. Per Contra, it is the stand of the learned Counsel for the revenue, that, Maize when it is subjected to heat and steaming, a commercially different commodity would emerge and therefore, flattened maize (Maize Poha) dealt with by the assessee will not fall under Entry 9 of Second Schedule to the KGST Act and therefore, requires to be classified as unclassified item and liable to be taxed at the general rate.

24. Maize normally known as corn in most parts of the world is a cereal grain that was domesticated in Mesoamerica and then spread throughout the American continents. Maize spread to the rest of the world after European contact with the Americans in the late 15th Century and early 16th Century. 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 State, Canada and Australia, the usual term is corn, which originally referred to any grain, but which now refers exclusively to Maize, having been shortened from the form, "Indian com". Many forms of maize are used for food, sometimes classified as various sub-species; Flour corn, Pop corn; Dent corn; Flint corn; sweet com; waxy corn; Amylo maize; Pod corn; and striped Maize. In

the United States and Canada, the primary use of the maize is as a feed for livestock. However, consumption of corn and corn meal constitutes a staple food in many regions of the world. Maize can also be prepared as "hominy", in which the kernels are bleached with lye or Grits which are coarsely ground corn. These are commonly eaten in the South Eastern United States, goods handed down from native Americans. Another common food made from maize is corn flakes. In fact, the maize is mostly widely grown cereal crop. In the global production of cereal crops, the maize rank first after rice (paddy) and wheat. Meal is a primary product obtained from Maize. The meal can be obtained by manual or mechanically milling. There are different ways to make manually the Maize meal, for example, in traditional culture of Central America, they use traditional tools to ground the grain slowly between two stones. (See Wikipedia Encyclopaedia)

25. Depending on the use of Maize, there are some other products of Maize which can be considered as primary products. In some countries, the grain is usually parched and eaten. Likewise, the hardflint or pop maize is popped in a hot plate and eaten hot as popped maize. (See Vikepaedia Encyclopedia). In some cases, Maize is heated and steamed than processed for flattening and then made it as flattened maize (Makkai Powa) or Maize Powa. In this regard, the only literature that is made available to us by the learned Counsel for the revenue, is the opinion furnished by the Food Processing and Nutrition Centre, Balussery, Kerala, on the request made by the Law Officer, Commercial Taxes, Kozhikode. In the said report/opinion, it is stated that Maize and flattened Maize are different; Flattened Maize is the processed product of Maize. So one is a processed produce and the other is the raw material. In the process of flattening, the maize is heated and steamed, the processed for flattening and made it as Maize flakes and it is used to mix with milk as fluid snacks, Maize is the raw material used for flattened maize, so the quality and nutritive value differs. The processed Maize which is cooked and if added with other nutritive additives, the quality and price will increase. However, learned Counsel appearing for the assessee relies on certain observations made by the Commissioner, Central Excise and Customs, Ahmedabad, in the appeal filed by M/s. Miki Food Products, Kansari, Kamby. The issue that was involved in the appeal was whether the Maize flake (Makai Pouva) is classifiable under the sub-heading 1904.10 of Chapter 19 of the Central Excise Tariff Act, 1985 or otherwise. The department in the said appeal had contended that the Maize Flake is a prepared food obtained by swelling or roasting the cereal products. The stand of M/s. Miki Food Products was that the produce, i.e. Maize flake manufactured by them is not an excisable product, as it is not covered under the description of subheading 1904.10. While considering the aforesaid issue, may be relying on chemical examiners report, has observed that, the prepared foods means the food which is ready for eating as well as the said food must have been obtained by swelling or roasting otherwise it will have place under heading 19.04 due to lack of aforesaid preparation. Not only that but the said heading also excludes Maize (corn) from the purview of the aforesaid heading as such the Maize pauva manufactured by them can not be classified

under subheading No 1904 of Chapter 19 of Central Excise Tariff Act, 1985. Before classifying aforesaid product under Heading 19.04, it is essential to ascertain whether it is prepared food.

26. Reference is also made by the learned Counsel for the assessee to the decision of Uttar Pradesh High Court in the case of Commissioner of Sales Tax, U.P., Lucknow v. Anand Ram Hari Ram, Kanpur 1982 U.P.T.C. 987, which decision according to the learned Counsel has been affirmed by the Apex Court, while rejecting the SLP filed by the State. In the aforesaid decision, the question before the court was, whether Makai pawa is taxable as corn flakes or food grains. While answering the said issue, the court has observed:

Whether Makai Pawa is taxable as conflakes under Notification No. ST-II-2989/X-10 (2)-1974 dated 3-4-1975 at the rate of 7% or as foodgrains at the rate of 4%. The question was raised u/s 35 by the assessee. The Sales Tax Tribunal has taken the view that the Makai Pawa was taxable as foodgrain at the rate of 4% and not as conflake. In the ordinary commercial sense of the words Makai Pawa would not be treated as conflakes. Before the Tribunal, the stand of the Department was that Makai Pawa is taxable as cornflake and on behalf of the assessee it was argued that it was taxable as a foodgrain. The Department did not urge before the Tribunal that in the event of its finding that Makai Pawa was not taxable as conflake, it was taxable under some other entry and not under the entry relating to foodgrains. In the circumstances, it is not open to the Department to argue in this revision that Makai Pawa was not taxable as a foodgrain.

27. Now coming back to the issue which is posed in this tax revision cases, let us begin with the entry which we are concerned with. The fact that Maize is a cereal is not disputed by either side. Under Entry 9 of Second Schedule to KGST Act, defines cereal as paddy, rice jowar, milo, bajra, maize, ragi, kodon, kutki and barli. It is a single point of levy and it is on the first sale in the State by a dealer who is liable to tax u/s 5 of the Act. According to settled legal principles, the sales tax is levied on the sale of different commercial commodities and not the production or manufacture of a particular substance out of which the commodity has been made out and as soon as the commercial commodities come into existence, they become separate taxable goods for the purpose of sales tax. It is also well settled that residuary entry can be applied only when on a construction of a specific heading it is not possible to come to the conclusion that the goods are covered by the specific entry. It is also well settled that an entry in taxing statute should be construed in its popular sense, meaning thereby the sense with which the people dealing with the subject matter is conversant.

28. Maize is acorn and it is included under the heading cereal. The maize is heated and steamed then processed for flattening and made it as maize poha or flattened maize. The term "processing" means subjecting a commodity to a process or treatment so as to develop it or make it fit for the market. The term "processing" has been explained in the case of Chowgale and Co. v. Union of

India 47 STC 124, and in that, it is stated, that the nature and extent of processing and of the change brought about as a result thereof may vary from case to case and there may, may not be, application of energy or force to effect a processing. It is the effect of the processing operations that is material for determining whether there has been processing of goods. In *Delhi Cold Storage vs. Commissioner of Income Tax*, the Apex Court has observed that processing as an action which brought forth some change or alteration of goods or the materials so as to bring into existence a different substance from what it was at the commencement of the process. In *Commissioner of Sales Tax v. D.S. Bist* 44 STC 392, it is held drying, roasting and packing of tea leaves is held to be processing. In the present case, the Maize is heated and steamed, then processed for flattening. The flattened maize is also called maize poha. By this process, in our view, the change so brought about certainly would bring about a new commercial commodity. In our view, even the opinion of Food Processing and Nutrition Centre, Balussery would assist us, in arriving at the aforesaid conclusion; in the report, it is stated that the flattened maize is a processed product of maize. By the process so employed, a product which is made edible has been brought about, and that produce according to the opinion of experts is a new commercial commodity. Applying the functional test or the test of common/commercial parlance and applying the principles laid down by the Apex Court in *Rajasthan Flour Mills case* and *Gopuram Gram Mills case*, we are of the opinion that Maize and Maize Poha are commercially different commodities.

29. Before parting with the case, out of deference to learned Counsel for the parties, we may just place it on record the decision on which reliance was placed by the learned Counsel for the Revenue Sri. Mohammed Rafiq. The decisions are, *Aspinwall and Co. Ltd. v. Commissioner of Income Tax* (2002) 125 STC 101, wherein the raw coffee berries undergoes an elaborate process to give it the shape of coffee beans. The court observed the same amounts to manufacturing activity. Reference is made to *Bangalore Wood Industries v. Asst. Commissioner of Commercial Taxes* 92 STC 603, *Sterling Foods v. State of Karnataka* and another 63 STC 239, *State of Karnataka v. B. Raghu Ramashetty* 47 STC 369, *Deputy Commissioner of Sales Tax v. Kunhabi and Co.* 66 STC 100. In all the aforesaid decisions cited at the bar, the question before the court was levy of purchase tax under different State statutes, and the court's have answered the meaning of the expression "goods consumer in the manufacture of other goods". In our view, these decisions would no way assist the revenue for answering the issue raised in these tax revision cases.

30. The learned Counsel for the assessee has brought to our notice the decision of West Bangal Taxation Tribunal in the case of *Ram Bilash Agarwal v. C.T.O. Durgapur Range and Ors.* 137 STC 510. The Tribunal following the decision of the Apex Court in *Alladi Venkateswaralu's case* has held that Poha (parched maize) is a cereal, since the produce converted from Maize into edible form, the identity of the maize as such is not lost. The reasoning and the conclusion reached by the Tribunal is primarily based on the observations made by the Apex Court in *Alladi*

Venkateswaralu"s case. We are of the firm view that Maize and Maize Poha are indeed different commercial commodities. Having regard to the employment of the words "that is to say", we cannot expand the scope of the entries. In doing so, we would be unjustifiably interfering with the power of the State to levy tax on a commodity which is commercially different from cereal in question, namely, Maize. Undoubtedly, Maise Poha is the product of manufacture. What was not edible is transformed into the edible form. As found by the Tribunal, it differs in size, shape and structure. It has a higher utility. We also find merit in the finding of the Tribunal that the raw material is consumed.

31. We would accordingly hold that Maize Poha are commercially different commodities, and Maize Poha is not covered by the term Maize under "cereal" in Entry 9 of Second Schedule to K.G.S.T. Act. Accordingly, we reject these revision petitions and confirm the orders passed by the Sales Tax Appellate Tribunal, Additional Bench, Kozhikode in T.A. Nos. 145/2003,157/2001,156/2001,158/2001,282/2003 and 99/1996. Consequently, all pending interlocutory applications are dismissed. There shall be no order as to costs.