

(2015) 09 KAR CK 0361

In the Karnataka High Court

Case No : C.R.P. Nos. 204, 230 and 103 of 2011(Tax)

State of Karnataka

APPELLANT

Vs

United Breweries Limited and Others

RESPONDENT

Date of Decision : 14-09-2015

Acts Referred:

Central Sales Tax Act, 1956 — Section 14, 15
Constitution of India, 1950 — Article 286
Karnataka Tax on Entry of Goods Act, 1979 — Section 2, 3

Citation : (2015) 09 KAR CK 0361

Hon'ble Judges : Vineet Saran, J;B.V. Nagarathna, J

Bench : Division Bench

Advocate : Shivayogi Swamy, AGA, for the Appellant; G. Rabinathan and Thirumalesh, Advocates for the Respondent

Final Decision : Allowed

Judgement

B.V. Nagarathna, J—These revision petitions raise interesting questions. Both these revision petitions are preferred by the State. As they raise common substantial questions of law, they have been connected together and are disposed of by this common order.

Background Facts:

2. CRP Nos. 204/2011 & 230/2011, are filed by the State against judgment dated 18/04/2011, passed by the Karnataka Appellate Tribunal (hereinafter referred to as the "Appellate Tribunal" for brevity) in STA Nos. 27 & 28/2011, whereas CRP No. 103/2011 is also filed by the State assailing judgment dated 29/07/2010 and 23/11/2010, passed by the Appellate Tribunal in STA No. 1955/2004.

3. For the sake of convenience, the facts arising in CRP. No. 103/2011 shall be dealt with first.

The respondent in this revision petition is a public limited company and a dealer,

registered under the provisions of Karnataka Tax on Entry of Goods Act, 1979 (hereinafter referred to as "Act" for brevity). It is engaged in the manufacture and sale of liquor, beer and sugar. The Assessing Authority levied entry tax on "barley malt"/"malted barley", under the provisions of the Act. Being aggrieved by the said levy, respondent preferred an appeal before the First Appellate Authority.

The Appellate Authority held that "barley malt" is different from "barley" and therefore it could not be considered to be an "agricultural produce" falling under Schedule-II of the Act, to qualify for exemption as contended by the respondent. Aggrieved by the said order the respondent herein preferred STA No. 1955/2004, before the Appellate Tribunal.

The Regular Bench of Appellate Tribunal referred, the matter for consideration of the Full Bench of the Appellate Tribunal. The Full Bench by the impugned judgment dated 29.07.2010, held that "barley malt" is an "agricultural produce" falling within Entry-2, of Schedule-II of the Act read with the definition of "agricultural or Horticultural Produce" as defined under Section-2(A)(1) of the Act and therefore, exempted from tax. Consequently, it allowed the appeal of the respondent and set-aside the order of the assessment. Being aggrieved by the order of the Appellate Tribunal, the State has preferred this revision petition.

4. On hearing learned Addl. Government Advocate for the State, we have formulated the following substantial questions of law for our consideration:

"1. In the facts and circumstances of the case whether the Tribunal is justified in giving a finding that malted barley/barley malt is an agricultural produce falling under II Schedule to the K.T.E.G. Act and is exempted from the levy of tax under the K.T.E.G. Act?

2. In the facts and circumstances of the case whether the Tribunal is right in interpreting the definition Clause of Section 2-A(1) of the K.T.E.G. Act, to hold that malted barley/barley malt continues to be barley even after processing?

3. In the facts and circumstance, whether the malted barley/barley malt is liable to tax under the provision of the K.T.E.G. Act?"

5. The relevant facts in CRP No. 204/2011 are that the respondent therein, is a public limited company engaged inter-alia, in manufacture and sale of beer. The First Assessing Authority levied entry tax on "barley malt"/"malted barley", maize flakes and hops pellets under the provisions of Act. Being aggrieved by the said levy, the respondent herein had preferred an appeal before the First Appellate Authority.

6. The First Appellate Authority held that those products could not be considered as "agricultural produce" falling under Schedule-II of Act, to qualify for exemption. Aggrieved by that order, the respondent herein had preferred STA. Nos. 27-28/2011 before the Appellate Tribunal.

7. The Appellate Tribunal following its full bench order which is the subject matter of revision in CRP No. 103/2011, held that "barley malt"/"malted barley", maize flakes and hops pellets are within the scope of definition of "agricultural produce" which are subject to exemption under Schedule-II of the Act. Being aggrieved by that order, the State has preferred this revision.

8. The aforesaid revision petition was admitted on 07/06/2012, to examine the following substantial questions of Law:

"1. In the facts and circumstances of the case whether the Tribunal is justified in giving a finding that malted barley/barley malt, Hops and Maize are agricultural produce falling under II Schedule to the K.T.E.G. Act and are exempted from the levy of tax under the K.T.E.G. Act?

2. In the facts and circumstances of the case whether the Tribunal is right in interpreting the definition Clause of Section 2-A(1) of the K.T.E.G. Act, to hold that malted barley/barley malt, Hops and Maize continues to be barley, malt, Hops and Maize even after processing?

3. In the facts and circumstances, whether the barley/Barley malt, Hops and Maize is liable to tax under the provision of the K.T.E.G. Act?

4. In the facts and circumstances of the case whether the Tribunal was right in holding that the Assessing authority has no jurisdiction to pass the assessment order under KTEG Act 1979?"

9. As the basis of the relief granted to the respondents in the two revision petition is the order of the Full Bench passed by the Appellate Tribunal on 29/07/2010, submissions have been made by the respective counsel on the correctness of that order for the purpose of answering the substantial questions of law raised by this court for its determination.

Submissions:

10. Learned Additional Government Advocate, appearing for the State contended that having regard to the definition of "agricultural or horticultural produce" under Section-2(A)(1) and sub-section-(6) of Section-3, which is the charging section read with Schedule-II of the Act, it is only "agricultural or horticultural produce" which is exempted from entry tax. That in the instant case "barley malt"/"malted barley" is not an "agricultural produce" as it has been subjected to certain processes and as a result, it has lost its character of being an "agricultural produce" simplicitor. He therefore contended that the Appellate Tribunal could not have held that "barley malt"/"malted barley" is an agricultural produce, subject to exemption under Schedule-II of the Act.

11. Adverting to the stages with regard to conversion of barley into "barley malt"/"malted barley", he contended that it involves three stages:

"i. Liquefaction of the germinated grain

ii. Washing

iii. Filtering, Evaporation and Drying."

That sprouted barley is dried in kiln by application of heat and as a result "barley grain" is converted into "barley malt". That the process of malting of barley involves germination of barley; which is a process by which barley is soaked which is liquefaction of germinated grain; germinated barley is washed and filtered; then the same is heated in kiln. These involve physical or mechanical processes and when such a product is brought into the local area as a Yaw material" for manufacture of beer it is not an "agricultural produce" but, it is a raw material within the scope of Entry-80 of Schedule-I. That the Appellate Tribunal while considering these aspects has erroneously held that "barley malt"/"malted barley" is an agricultural produce falling under Schedule-II of the Act and it is exempted from levy of entry tax which is incorrect. Referring to certain decisions it was contended that "barley malt"/"malted barley" is subjected to entry tax under Entry-80 of Schedule-I of the Act as any agricultural produce which is subjected to a process for being made fit for consumption, it is no longer agricultural produce, which could be exempted from tax under the Act.

12. Per contra, learned counsel for the respondent supporting the impugned orders, passed by the Appellate Tribunal, contended that "barley malt"/"malted barley" is indeed an "agricultural produce" which is subject to exemption under Schedule-II of the Act. Responding to the contentions advanced on behalf of the State with regard to the processes by which the barley grain/barley cereal gets converted to "barley malt"/"malted barley", he contended that even if certain processes are applied to the cereal as such, such a processes must ultimately result in making the produce fit for consumption, which according to him is, human consumption.

13. According to the learned counsel, even if the produce is subjected to physical, chemical or other processes but it is not fit for human consumption, then in that case, it continues to be an "agricultural produce", which is subjected to exemption under the Act. Drawing our attention to the definition of "agricultural or horticultural produce", he contended that the definition is in a negative language. It categorically states as to what produce are not "agricultural produce and horticultural produce" and those which are subjected to certain processes but not being fit for human consumption, would continue to remain as "agricultural produce". It is only when the produce is subjected to physical, chemical or other processes for being made fit for human consumption, it ceases to be "agricultural produce". Also any agricultural produce which is subject to the process of cleaning, grading, sorting or drying, continues to remain as an "agricultural produce".

14. Referring to judicial precedent, he contended that in the instant case, the Appellate Tribunal rightly held that "barley malt"/"malted barley" continues to be an "agricultural produce", despite being subject to those processes and hence, is

exempted from payment of entry tax under Schedule-II of the Act.

Similar arguments were made with regard to maize flakes/grits and hops pellets.

Legal Frame work:

15. Before we answer the substantial question of law raised in these petitions, it would be useful to extract the relevant provisions of the Act.

Section-3 of the Act is the charging Section. Sub-sections-(1) and (6) of Section-3 of the Act, are relevant for the purpose of case and they are extracted as under:

"3. Levy of Tax.--(1) There shall be levied and collected a tax on entry of any goods specified in the First Schedule into a local area for consumption, use or sale therein, at such rates not exceeding five per cent of the value of the goods as may be specified retrospectively or prospectively by the State Government by Notification, and different dates and different rates may be specified in respect of different goods or different classes of goods or different local areas."

(6) No tax shall be levied under this Act on any goods specified in the Second Schedule mentioned in the Schedule on its entry into a local area for consumption, use or sale therein."

In sub-section-(6), of Section-3 of the Act, there is a reference to Schedule-II and for the purpose of this case, the relevant entry in Schedule-II is entry No. 2, which reads as under:

"(2) "agricultural produce, including Tea, Coffee and Cotton (whether ginned or unginned)"

The expression agricultural or horticultural produce is defined under Section-2(A) (1) of the Act, which reads as under:

"2(A) In this Act, unless the context otherwise, requires,-

(1) "'agricultural produce or horticultural produce" shall not include tea, beedi leaves coffee, rubber, cashew, cardamom, pepper and cotton; and such produce as has been subjected to any physical, chemical or other process for being made fit for consumption, save mere cleaning; grading, sorting or drying."

Entry-80 of Schedule-I on which reliance has been placed by the State and which has been amended with effect from 01/04/2001 reads as under:

"80. Raw materials, component parts and inputs which are used in the manufacture of an intermediate or finished product, other than those specified in Second Schedule."

16. The bone of contention between the parties herein is with regard to Entry-80 of Schedule-I and Entry-2, of Schedule-II vis-?-vis, the products in question.

17. The contention of the learned Additional Government Advocate is that "barley malt" or "malted barley" is a raw material or an input, which is used in the manufacture of finished products namely, beer and therefore it is subjected to entry tax. A similar contention has been raised with reference to maize flakes or grits and hops pellets.

18. Per contra, the contention of the learned counsel for the respondent is that Entry-80 of Schedule-I, itself makes a reference to Schedule-II and therefore if any raw material, component part or any other input used in the manufacture of an intermediate or finished product such as agricultural produce, which is mentioned in Schedule-II, then it is exempted from entry tax.

19. On a conjoint reading of the aforesaid provisions, it is clear that under Section 3 of the Act, entry tax is levied and collected on entry of goods specified in Schedule-I, into a local area for consumption, use or sale therein at the specified rates. The expression "local area" is defined under sub-section-(5) of Section-2 of the Act, whereas "goods" is defined under Sub-section-4(a) of Section-2.

20. It is also necessary to note that Sub-section (6) of Section-3 of the Act, categorically states that no tax shall be levied under the Act on any goods specified in Schedule-II on its entry to a local area for consumption, use or sale therein. Thus, the scope of the definition of the exempted product under Schedule-II, relevant to the case namely, "agricultural produce" must be first understood.

Analysis of definition of agricultural or horticultural produce:

21. The definition of "agricultural produce or horticultural produce" is couched in negative language. The definition does not state what is included in the expression "agricultural or horticultural produce". It only states what are excluded. In the first place, it excludes tea, beedi leaves, coffee, rubber, cashew, cardamom, pepper and cotton. Secondly, all produce which have been subjected to any physical, chemical or other process for being made fit for consumption are excluded. However, there is an exception to this exclusion. If any process involves merely cleaning, grading, sorting or drying of the produce then, it does not cease to be an agricultural produce. Thus, excluding the aforesaid, all other products which are indeed agricultural or horticultural produce are covered within the definition clause.

22. On the other hand, the expression "agricultural produce" in the II Schedule is inclusive in nature, which expressly includes, tea, coffee and cotton (whether ginned or unginned), although these products are specifically excluded from the definition of "agricultural produce" for the purpose of levy of entry tax. The legislative intention appears to be to exclude tea, coffee and cotton, which are cash crops or plantation crops from the definition "agricultural produce" but they have been intentionally included within the expression "agricultural produce" in the II Schedule, so as to exempt them from the levy of entry tax. Also,

agricultural produce subjected to certain process to be made fit for consumption ceases to be agricultural produce under the definition clause and would be subject to entry tax.

23. While considering the definition of "agricultural produce" in the context of sub-section (6) of Section 3 of the Act, the Hon"ble Supreme Court in *Falcon Tyres Ltd. Vs. State of Karnataka and Others*, AIR 2006 SC 2712 : (2006) 6 JT 493 : (2006) 7 SCALE 250 : (2006) 6 SCC 530 : (2006) 3 SCR 734 Supp : (2006) 147 STC 466 : (2006) 2 UJ 1011 : (2006) AIRSCW 3667 : (2006) 6 Supreme 93 , has opined that Entry-2 of II Schedule creates exceptions regarding a few of the excluded items of the definition clause from payment of entry tax, but not all excluded items. Thus, the items mentioned in Entry-2 of Schedule-II would be exempted from payment of entry tax but not the items which have been excluded from the definition of agricultural produce. Thus all produce which fall within the definition clause of agricultural produce are exempted from payment of entry tax.

24. Thus, while interpreting the provisions of the Act, the legislative intention would have to be given effect to in consonance with the definition as contained in the statute. In that case, rubber, being excluded from the definition of "agricultural produce" and only tea, coffee and cotton (whether ginned or unginned) though excluded from the definition of agricultural produce, being included in the exemption clause and no other item such as rubber, cashew, cardamom, pepper and such other agricultural produce which has been subjected to any process for making it fit for human consumption being mentioned in the exemption schedule, it was held that the Legislature had deliberately excluded certain items for the purpose of giving exemption, from payment of entry tax. In other words, the intention of the Legislature is that though tea, coffee and cotton have been excluded from the definition clause of "agricultural produce", but for the purpose of levy of entry tax, tea, coffee and cotton are exempted from payment thereof. This is an exception created by the Legislature. Simply because tea, coffee and cotton are included in the Second Schedule exempting it from payment of entry tax would not imply that all other items of agricultural produce which have been excluded from the definition of "agricultural produce" would also stand included in the II Schedule to the Act, thereby exempting them from payment of entry tax, is the observation of the Hon"ble Supreme Court.

25. In the context of II Schedule and the definition of "agricultural produce", the Hon"ble Supreme Court has cited the example of potatoes. If potatoes are cleaned, graded, sorted or dried, they would remain agricultural produce but in case raw potato is subjected to a process and converted into chips for human consumption, it would cease to be an agricultural produce for the purpose of the Entry Tax Act. According to the Hon"ble Supreme Court, the expression "such produce" in the second part of the definition does not refer to the produce which has already been excluded from the expression "agricultural produce" but refers to such other agricultural produce which has been subjected to any physical,

chemical or other process for being made fit for consumption.

26. Thus, when the agricultural produce is subjected to any physical, chemical or other processes, for being made fit for consumption, then in that case, it ceases to be an "agricultural produce". The example of potatoes being converted into chips for human consumption would imply that potato has ceased to be an agricultural produce for the purpose of Entry Tax Act and therefore, is not subjected to exemption. But if potato is merely cut and dried and enters the local area, then it would continue to be an agricultural produce.

Meaning of Consumption:

27. As already noted Section 3 is the charging section which uses the expression, "consumption, use or sale." The expression "consumption" is also used in the definition clause of "agricultural or Horticultural produce. According to the definition clause, if an agricultural produce is subjected to any physical, chemical or other process for being made fit for consumption, then it ceases to be an agricultural produce. After being made fit for consumption, agricultural produce is brought into a local area for the purpose of consumption. Thus when an agricultural produce is processed for being made fit for consumption and brought to the local area for consumption use or sale, then it is no longer an agricultural produce.

28. The expression consumption, according to the learned counsel for respondents must be read to mean human consumption. Thus according to him, if a produce is processed for being made fit for human consumption, then it no longer would be an agricultural produce, but if the produce is processed for any other form of consumption, then it continues to be an agriculture produce. The expression consumption which is used in Section 3 as well as definition clause has a bearing on the issue under consideration and it would be useful to delineate on and understand that expression in the context of controversy raised in this case with reference to judicial dicta.

"(a) In *Anwarkhan Mahboob Co. Vs. The State of Bombay (Now Maharashtra) and Others*, AIR 1961 SC 213 : (1961) 1 SCR 709 : (1960) 11 STC 698 , the Hon"ble Supreme Court was considering Explanation to sub-clause (a) of clause(1) to Article 286 of the Constitution (since deleted) in the context of interstate trade, wherein, the expression "consumption within the State" was held to mean that if goods were brought within a state for the purpose of consumption, then it would not be a case of an inter-state trade. The facts of that case were that tobacco was purchased and in the State of Bombay the stem and dust from tobacco were removed. It was contended that removing of stem and dust from tobacco did not amount to consumption of tobacco. The Hon"ble Supreme Court held that when tobacco was delivered in the State of Bombay for the purpose of changing it into commercially different article, namely bidi patti, the delivery was for the purpose of consumption, as conversion of a commodity into a different commercial commodity, by subjecting it to some processing, is

consumption within the meaning of the explanation of Article 286.

The Hon^{ble} Supreme Court noted that the act of consumption with which people are most familiar occurs when they eat, drink or smoke. Taking the example of cotton, it was held that at every stage, process of cotton would be bringing into existence a commercial commodity different from what was received by the producers. It was held that whenever a commodity is so dealt with as to change it into another commercial commodity, there is consumption of the first commodity within the meaning of the explanation to Article 286. Thus, according to the Hon^{ble} Supreme Court, conversion of the commodity into a different commercial commodity by subjecting it to some processing is consumption within the meaning of the explanation to Article 286, no less than the final act of consumption, when no distinct commodity is being brought into existence, but what was brought into existence is being used up. Thus, the principle enunciated by the Hon^{ble} Supreme Court was that the treatment given to a particular commodity if it converts that commodity into a different commercial commodity, then there would be consumption, then the different commercial commodity may in turn be used as raw material for producing some other commodity, which would ultimately be used as a final product; nevertheless, at every intermediate stage where there is a conversion of commodity into a different commercial commodity by subjecting it to some process there would be consumption. Thus, the test is that there must be a conversion of a commodity into a different commercial commodity by subjecting it to some process in order to come within the expression of consumption even though that may not be the final product. The said connotation of the word "consumption" could safely be applied to the definition of "agricultural produce" under the Act.

(b) In *State of Travancore-cochin and Others Vs. Shanmugha Vilas Cashew Nut Factory and Others*, AIR 1953 SC 333 : (1954) 1 SCR 53 , it was held that when raw cashew nuts, after they reached the respondents, were put through a process and new articles of commerce, namely, cashew nut oil and edible cashew nut kernels, were obtained, it follows, that the raw cashew nut was consumed by the respondents. Thus, use and consumption would involve conversion of the commodity into a different commercial commodity by subjecting it to some processing.

(c) In *Kathiawar Industries Ltd. Vs. Jaffrabad Municipality*, AIR 1979 SC 1721 : (1979) 4 SCC 56 : (1980) 1 SCR 243 : (1979) 11 UJ 732 , the question was whether salt manufactured by the appellant therein outside the octroi limits and brought within those limits for the purpose of being crushed into powder in the appellant's factory situated within those limits and then exported was liable to octroi. Applying the test laid down in the case of *Anwarkhan Mahaboob Co.*, it was held that when uncrushed salt was crushed in the factory and a commercially different article was produced, the uncrushed salt must be held to have been consumed.

(d) In *Deputy Commissioner of Sales Tax (Law), Board of Revenue (Taxes)*,

Ernakulam Vs. Thomas Stephen and Co. Ltd., Quilon, AIR 1988 SC 997 : (1988) 34 ELT 412 : (1988) 1 JT 631 : (1988) 1 SCALE 569 : (1988) 2 SCC 264 : (1988) 3 SCR 248 : (1988) 69 STC 320 , which arose under the provisions of Kerala General Sales Tax Act, 1963, while referring to Section 5-A, it was held that consumption must be in the manufacture as raw material or of other components which go into the making of the end products. But goods used for ancillary purposes like fuel in the process of the manufacture, do not fall within Section 5-A(1)(a) of the Act.

On a construction of Section 5-A(1)(a)(c) of the Act, the Hon''ble Supreme Court held that consumption of a commodity must be in the manufacture of another commodity. The goods purchased should be consumed, the consumption should be in the process of manufacture and the result must be manufacture of other goods. In that case, cashew shells were used as in the use of kiln and therefore, it was used as an ancillary purpose and not consumed in the manufacture of another product. Hence, it was held that Section 5-A was not applicable to cashew shells.

(e) Also in HMM Ltd. and another Vs. The Administrator, Bangalore City Corporation, Bangalore and another, AIR 1990 SC 47 : (1997) 91 ELT 27 : (1989) 4 JT 147 : (1989) 4 SCC 640 : (1989) 1 SCR 353 Supp , the facts were that Horlicks powder was brought into octroi limits in bulk containers (large steel drums) and packed at the packing station in unit containers (glass bottles) and thereafter exported outside those limits. On the above facts, the Hon''ble Supreme Court held that in the process of putting powder from drums to the bottles for the purpose of exporting or taking out of the municipal limits, Horlicks powder was neither used nor consumed and therefore, octroi could not be levied or collected.

(f) Placing reliance on the above decision in Mafatlal Industries Ltd. Vs. Nadiad Nagar Palika and Another, AIR 2000 SC 1223 : (2000) 72 ECC 472 : (2000) 117 ELT 290 : (2000) 2 JT 564 : (2000) 2 SCALE 152 : (2000) 3 SCC 1 : (2000) 2 SCR 52 : (2000) 118 STC 494 : (2000) 2 UJ 839 : (2000) AIRSCW 889 : (2000) 2 Supreme 53 , the Hon''ble Supreme Court held that when cloth piece of 100 meters length were brought within the octroi limits and cut into smaller pieces for the purpose of exporting, it did not amount to use or consumption thereof and therefore did not attract levy of octroi.

(g) In this context, it would be relevant to refer to another decision of the Hon''ble Supreme Court rendered under Section 5A(1)(a) of the Kerala General Sales Tax Act, (15 of 1963) in the case of Deputy Commissioner of Sales Tax (Law), Board of Revenue (Taxes), Ernakulam Vs. Pio Food Packers, AIR 1980 SC 1227 : (1980) 6 ELT 343 : (1980) 3 SCR 1271 : (1980) 46 STC 63 , wherein it was held, although pineapple fruit is subjected to a degree of processing when it is sold in sealed cans inasmuch as there is preparation of pine slices from the original fruit, the commodity continues to possess its original identity, notwithstanding the removal of inedible portions, the slicing and thereafter

canning it, on adding sugar to preserve it."

In this case, the Hon"ble Supreme Court held as under:--

"The generally prevalent test is whether the article produced is regarded in the trade, by those who deal in it, as distinct in identity from the commodity involved in its manufacture. Commonly, manufacture is the end result of one or more processes through which the original commodity is made to pass. The nature and extent of processing may vary from one case to another, and indeed there may be several stages of processing and perhaps a different kind of processing at each stage. With each process suffered, the original commodity experiences a change. But it is only when the change, or a series of changes, take the commodity to the point where commercially it can no longer be regarded as the original commodity but instead is recognized as a new and distinct article that a manufacture can be said to take place. Where there is no essential difference in identity between the original commodity and the processed article it is not possible to say that one commodity has been consumed in the manufacture of another. Although it has undergone a degree of processing, it must be regarded as still retaining its original identity."

(h) In *State of Karnataka Vs. B. Raghurama Shetty and Others*, AIR 1981 SC 1206 : (1981) 1 SCALE 571 : (1981) 2 SCC 564 : (1981) 3 SCR 280 : (1981) 47 STC 369 : (1981) 13 UJ 361 , the question for consideration under the provisions of the Karnataka Sales Act, 1957, was as to whether the turnover price paid could be levied for purchasing paddy for the purpose converting it into rice for sale in their respective rice mills. Referring to *Ganesh Trading Co., Karnal Vs. State of Haryana and Another*, AIR 1974 SC 1362 : (1974) 3 CTR 6 : (1974) 3 SCC 620 : (1973) 32 STC 623 , it was held that though rice was produced out of paddy, the latter produce did not continue to be paddy even after dehusking. It changes its identity. Rice is not known as paddy. It would be a misnomer to call rice as paddy. Thus when paddy is dehusked and rice produced, there has been change in the identity of the goods. Thus it was held that when paddy was purchased for being converted into rice, the latter was a commercially different commodity.

(i) In *Punjab Aromatics Vs. State of Kerala*, (2008) 7 SCALE 691 : (2008) 11 SCC 482 : (2008) 14 VST 519 , the question was whether the conversion of red oil into sandalwood oil amounted to consumption or use of red oil (the purchased oil) in the process of conversion into sandalwood oil. The test of irreversibility was relied upon as an important criterion to ascertain as to when a given process amounts to manufacture. On the facts of that case, it was held that from sandalwood oil the product could become red oil once again. In the circumstances, it was held that red oil and sandalwood oil were not two different and distinct products.

(j) In the aforesaid case, *Tungabhadra Industries Ltd. Vs. The Commercial Tax Officer, Kurnool*, AIR 1961 SC 412 : (1961) 2 SCR 14 : (1960) 11 STC 827 was

cited, wherein it was held that hydrogenated groundnut oil continues to be groundnut oil notwithstanding the hydrogenation process, as there was no change amounting to manufacture.

(k) In *Sinnar Bidi Udyog Ltd. Vs. Sangamner Municipal Council*, (1995) MhLj 552, the matter arose under the Maharashtra Municipal Councils Act, 1965 but on the question of tax on the entry of goods into a municipal area, for a consumption or use or sale therein. In that case, a company had brought "Kaccha Bidi" after they were manufactured outside municipal limits, within municipal area, roasted in some special procedure and packed, so that they could be sold for human consumption. When the municipal council sought to levy octroi on the "Kaccha Bedi", a suit was filed seeking perpetual injunction restraining the municipal council from levy of octroi on the said product, it was held by the Bombay High Court that when the consumption covers the process by which the nature of the commodity changes and in that process the commodity in question can be said to have been used for creating another commodity. "Kaccha Bedi" was subject to a process for preparing a finished produce for human consumption and therefore, the municipal council was justified in levying octroi."

29. In the case of *Raghurama Shetty (supra)*, it has been categorically held that the expression consumption, must be understood in the economic sense i.e. on the basis of levy of Value Added Tax popularly called as "VAT". It was held that manufacture also consumes commodities which are ordinarily called raw materials when one produces semi-finished goods which have to undergo further processes of production before they can be transformed into consumers' goods. Thus, at every stage of production it is obvious there is consumption of goods even though at the end of it there may not be final consumption of goods but only production of goods with higher utility, which may be used in further productive processes. Thus under the definition clause, the test is that agricultural produce must be subjected to a process to make it fit for consumption when it is brought into the local area. In such an event, agricultural produce ceases to be within the scope of the definition clause.

Comparison between definition & exemption clauses:

30. In the instant case, the definition clause and the exemption clause may be re-visited. Certain items which are excluded in the definition clause are included in the exemption clause expressly. But the question is whether, a produce which is excluded in the definition clause could be included in the exemption clause, by implication. The exemption clause i.e. Entry 2 of Schedule II of the Act is inclusive and therefore an expansive interpretation could be given, but at the same time it has to be borne in mind that an exemption clause must be construed strictly. In the exemption clause certain products, which are excluded in definition clause are included expressly such as tea, coffee and cotton. There is no express inclusion of agricultural produce subjected to a process for being made fit for consumption. In fact, when an agricultural produce is processed to

be made fit for consumption, it is excluded from the purview of the definition of agricultural produce. If that is so, then the same cannot be read within the scope of the exemption clause pertaining to agricultural produce.

31. In the definition clause, there are two aspects to be noted. Firstly, agricultural produce has been subjected to any physical, chemical or other process and secondly, the object of subjecting agricultural produce to such a process is to make it fit for consumption, in which event, agricultural produce would not come within the definition under the Act. The expression "consumption" according to the learned counsel for respondents must be interpreted to mean only human consumption, but we do not think that the expression can be given such a narrow interpretation, in the absence of the same being defined under the Act.

32. When the definition states that if by a physical, commercial or other processes an agricultural produce is made fit for consumption, then it would no longer be an agricultural produce. Therefore, consumption would imply that there is a conversion of the commodity into a different commodity.

33. In the aforesaid background, the case of barley malt or malted barley could be considered. Admittedly, barley is a food grain. Malted barley is barley which has been germinated or sprouted. Malted barley is used for manufacturing alcohol, beer and such other products. The product manufactured may be an industrial product but the question is as to whether barley, which has been made fit for consumption as malted barley and used as raw material for an industrial purpose, would cease to be an agricultural produce. The said question would be answered later.

34. Maize is subjected to a process in order to convert it into maize flakes and grits before they are used as raw materials in the manufacture of beer. Maize goes through processing of cleaning, conditioning, tempering, secondary conditioning and de-germination, which is made fit to use in the manufacture of beer as flakes or grits. Maize flakes or grit is a product obtained through de-germination of yellow corn and its subsequent grinding to make flaking grits.

35. Having regard to the aforesaid process, it is clear that maize flakes or grits, which is no longer the same as maize or corn. Maize flakes or grits is altogether a different commodity, which would come into existence after maize is subjected to certain processes for being made fit for consumption. Also, as maize is converted into maize flakes or grits altogether new commodity comes into existence and thus, the conversion of maize into maize flakes by subjecting it to some process is in order to make it fit for consumption and the said commercial commodity is made fit for consumption in the preparation of beer.

36. Thus, it is held that maize flakes is not an agricultural produce as the said commodity is a distinct commercial commodity, which can be utilized in the manufacture of beer or consumed as breakfast cereal. Maize, which is subjected to a process in order to make it fit for consumption, either human or industrial,

as in the instant case, for preparation of beer, ceases to be an agricultural produce.

37. Hops is one of the raw materials in the manufacture of beer. Hops are female flower clusters commonly called cones or strobiles of the humulus plant (*humulus lupulus*), is an horticultural process. They are used primarily as a flavoring and stability agent in beer. Baled hops are broken up and passed into an air-stream which delivers them to a hammer-mill. Heavy foreign materials drop out and metal fragments are removed using magnets. The cone hops are milled until they pass through a sieve. The powder from many bales is mixed and homogenized in a blender and then conveyed to a pellet die. The pellets are immediately cooled and cooled pellets pass over a shaker where dust is removed and re-circulated through the plant. The clean pellets are packaged in laminated, plastic/aluminum foil pouches, evacuated and boxed. The packs may be back-flushed with carbon dioxide or nitrogen gas to produce a soft pack container. Normally, pellets are called T-90, T-30 and T-45 pellets.

38. Chemically modified hops are called "pellets", isomerized extracts or reduced extracts used in brew-house and following fermentation. Thus, hops, flowers or cones does not come under the purview of agricultural/horticultural produce as these are processed or are subjected to processes to be utilized or consumed in the manufacture of beer in the form of pellets. Hops flowers are subjected to physical, chemical and other processes to convert it to pellets and made fit for consumption in the manufacture of beer. Moreover, it no longer retains its original identity. Thus, it is held that hops pellets does not come within the scope of definition of agricultural produce.

39. While considering the meaning of the expression barley malt or malted barley given in various dictionaries, it is argued that malt is an other form of barley. Malting is a process whereby barley is germinated and sprouted. Such malting process is also used in other cereals like wheat, maize, oats, etc., which are malted, as such, malt is nothing but sprouted and germinated barely. It is argued that barley or malted barley is a food grain, which is used in alcoholic products by fermentation and other process. The product manufactured by use of malted barely may be an industrial produce, but it does not make malted barely or barley malt per se, an industrial product. It is only a raw material of industrial produce such as beer but it continues to be a food grain, as it is a cereal, is the subject of learned counsel for respondents.

40. Of course, the process involved in converting barley into malted barley or barley malt is not mere cleaning, grading, sorting or drying. Barley is germinated and germination is stopped at a suitable point of the development of the sprout by the application of heat and drying. The grain is indistinguishable from barley in appearance except to the extent that the sprout changes its appearance. It has somewhat different properties but it is still capable of being used as seed and it has not lost its physical identity.

41. In our view, the authorities below, including the Tribunal, have not been right in their approach to the controversy in question, which is based on the above premise. The test is not whether the produce in question namely, barley Malt or malted barley, maize flakes or hops pellets are distinct from their original form, after being subjected to a process in order to make them fit for consumption or they have retained their original identity, despite being subjected to a process after being made fit for consumption. Rather, the test should be, whether, the product has been subjected to a process in order to make it fit for consumption, when it enters the local area so as to take it outside the scope of definition clause.

42. The judgment relied upon by the Tribunal in the case of *The Commissioner, Trade Tax, U.P. Vs. National Cereal Product etc. etc.*, AIR 2005 SC 2773 : (2005) 3 JT 127 : (2005) 3 SCC 366 : (2005) 140 STC 69 , rendered by the Hon''ble Supreme Court and the judgment of the Allahabad High Court between the same parties on the same controversy are not relevant in order to answer the substantial questions of law raised in these matters. In the aforementioned cases, the question was whether malted barley continued to be a cereal ever after barley was subjected to a process of germination etc. There the question was, whether barley malt was a food grain or cereal. In *Commissioner of Trade Tax Vs. National Cereal Products Limited*, (1998) 111 STC 241 the Allahabad High Court, after an elaborate discussion, held that malted barley continued to be a cereal within the definition section 14 of the Central Sales Tax Act, 1956, which deals with declared goods. When that judgment was assailed before the Hon''ble Supreme Court it was to consider the question, as to whether, with effect from the date of the Notification, the turnover of first purchases of foodgrains, including cereals and pulses, other than cereals and pulses as defined in section 14 of the Central Sales Tax Act, 1956, were liable to tax at the rate of 4% at the point of sale to the consumer. The Hon''ble Supreme Court noted that the Notification by which the rate of tax had been fixed in respect of foodgrains made it clear that the definition of "foodgrain" in the Notifications was wider than that of Section 14 of the Central Sales Tax Act, 1956 which dealt with the expression "cereal" and that the notifications were not exception notifications but contained charging provision. Therefore, the onus to prove that malted barley did not fall within the scope of expression foodgrain or cereal was on the Revenue. The latter had failed to discharge their onus, and it was held to be a foodgrain or a cereal.

43. In *Rajasthan Roller Flour Mills Association and another Vs. State of Rajasthan and others*, AIR 1994 SC 64 : (1993) 5 JT 138 : (1993) 3 SCALE 600 : (1994) 1 SCC 413 Supp : (1993) 2 SCR 72 Supp : (1993) 91 STC 408 , the question arose under the provisions of Central Sales Act, 1956. Section 14 of that Act declares certain goods to be of special importance in inter-State trade and commerce, referred to as declared goods. Section 15 of that Act imposes certain restrictions upon, and conditions in regard to the imposition of tax on sale or purchase of declared goods by a State Legislature. The restrictions are: (i) the State tax on

intra-State sale of declared goods shall not exceed 4%, (ii) the tax shall not be imposed at more than one stage, and (iii) if declared goods are subjected to State tax on their sale within the State (intra-State sale) and such goods are later sold in the course of inter-State trade or commerce (inter-State-sale), the tax paid on such intra-State sale shall be reimbursed to the person effecting inter-State sale.

In the context of the above pleadings, the specific question that arose was whether wheat, milled into maida and suji or flour, are not commodities different from wheat. It was held that wheat flour, maida and soji are different commodities from wheat just as rice is, derived from paddy. When wheat is consumed for producing flour, maida or suji, wheat loses its identity, it gets consumed and new commodity is formed. The new goods so emerging have a higher utility than the commodity consumed. Commercially speaking, they are different goods. Thus, it was held that flour, maida and soji derived from wheat are not wheat, within the meaning of Section 14 of the Sales Tax Act and they are not declared goods excisable to tax at 4%.

44. But under the definition of agricultural produce, which is under consideration, all the three produces name barley, Maize & hops, originally are agricultural or horticultural produce. There is no doubt about that. But all these produces have been subjected to certain processes, the object of which is for being made fit for consumption, in the manufacture of beer. Once an agricultural produce is subjected to any physical, chemical or other process for being made fit for consumption, either as a final product or as an intermediate product, for being consumed in any manufacturing process in the local area, then the said produce is excluded from the scope of definition, when the same enters the local area. Therefore, the test is not, as to whether, the agricultural produce being subjected to certain process has retained its original identity or not. The true test is, as to whether, the agricultural produce when subjected to physical, chemical or other process has been made fit for consumption as a final product or as an intermediate product when it enters the local area. While being subjected to certain processes the agricultural produce may or may not retain its original identity. That is an irrelevant factor. What is relevant is as to whether an agricultural produce has been subjected to process when it enters the local area, in order to make it fit for consumption, either as a final product or as a raw material, for other products. If an agricultural produce is subjected to a process for being made fit for consumption, it is excluded from the definition clause. When it is expressly excluded from the definition clause, it cannot be included in the exemption clause by implication or on the premise that the product has retained its original identity despite being subjected to a process. Therefore, it has to be held that when an agricultural produce is subjected to a process for being made fit for consumption i.e. either for human consumption or consumption in a manufacturing process or for consumption of livestock or animals, then it ceases to be an agricultural produce. But only on those agricultural produces which are made fit for consumption in a manufacturing

process as a raw material, or as an input used in the manufacture of intermediate or finished product, entry tax is leviable, under entry 80 of Schedule-I. Then it cannot be construed as an agricultural produce within the Entry-2 of Schedule-II, which contains the list of exempted products. Thus the question as to whether during the process of making an agricultural produce fit for consumption, it had changed or was converted into another product or lost its identity is irrelevant. Thus, in the instant case, it was not at all necessary for the authorities below or for the Tribunal to go into the nature of process whereby barley, maize and hops flowers were being subjected to, in order to ascertain as to whether they continued to be retain their original identity as agricultural produce.

45. As already noted, the change in their original form or identity is irrelevant for the purpose of definition clause. On the other hand, what is relevant is to ascertain as to whether those produces had been subjected to a process for being made fit for consumption i.e. in the manufacture of beer in the instant case. When once it is admitted by the respondents that those products were subjected to certain processes for being used as raw materials in the preparation or manufacture of beer, it must be held that they were subjected to certain processes for being made fit for consumption, in which event, those products cannot be considered to be agricultural or horticultural produce within the definition clause. Hence, they are not subject to exemption from payment of entry tax under the Act.

46. In *Burmah Shell Oil Storage and Distributing Co. India Ltd. Vs. The Belgaum Borough Municipality*, AIR 1963 SC 906 : (1963) 2 SCR 216 Supp , a constitution Bench of the Hon"ble Supreme Court held that the word consumption in its primary sense means the act of consuming and in ordinary parlance means the use of an article in a way which destroys, wastes or uses up that article. But in some legal contexts, the word consumption has a wider meaning. It is not necessary that by the act of consumption the commodity must be destroyed or used up.

47. Hence, the substantial questions of law raised in these petitions are answered in favour of the State. It is held that malted barley/barley malt, hops pellets and maize flakes are not agricultural/horticultural produce falling under Entry-2 of Schedule-II of the Act and they are not exempted from the levy of tax under the Act. Thus, the aforesaid products are liable to tax under the Act.

48. The orders of the lower appellate authority holding that these three products are not agricultural or horticultural produce is correct, but the reasoning is incorrect. On the other hand, the judgments of the Tribunal holding that those products are agricultural produce, are incorrect. Therefore, the judgments of the Tribunal are set aside. The reasoning of the appellate authority is modified by the reasons given in this order. The revision petitions filed by the State are allowed.

49. Parties to bear their respective costs.