

(2014) 03 KL CK 0151

High Court Of Kerala

Case No: Writ Petition (Civil) Nos. 13780, 16328 and 30086 of 2013 and 1477, 1608, 3850, 3920, 4458 of 2014

Foods, Fats and Fertilizers Ltd.

APPELLANT

Vs

State of Kerala

RESPONDENT

Date of Decision: March 27, 2014

Acts Referred:

- Kerala Value Added Tax Act, 2003 - Section 6(1), 6(1)(d), 62(1), 94, 94(4)

Citation: (2014) 74 VST 56

Hon'ble Judges: P.R. Ramachandra Menon, J

Bench: Single Bench

Advocate: V.V. Asokan and K.I. Mayankutty Mather, Advocate for the Appellant; George Mecheril, Special Government Pleader, Advocate for the Respondent

Judgement

P.R. Ramachandra Menon, J.

Whether industrial margarine popularly known as bakery margarine is liable to attract only a lesser rate of tax at four per cent, as an "edible oil" given under entry 38(19)(d) of the Third Schedule to the KVAT Act, notwithstanding inclusion of "margarine" under entry 64 of SRO 82/2006 stipulating higher rate of 12.5 per cent, is the disputed question involved herein. Though the position of law was made clear by a Division Bench of this court, as per the decision reported in [SSD Oil Mills Co. Ltd. Vs. State of Kerala](#), referring to the relevant provisions under the KVAT Act and the HSN Code (Harmonious System of Nomenclature) under the Customs Tariff Act, holding it in favour of the Revenue, the proposition mooted by the petitioners is that the said decision is no more a good law, in view of the ruling rendered by the apex court, in [Aluva Sugar Agency Vs. State of Kerala](#), (under the KGST Act and with reference to the relevant notification) holding that margarine is liable to be assessed with the concessional rate of tax at four per cent, treating it as an edible oil (having given the benefit of a lesser rate to "edible oils", as per the relevant notification, notwithstanding the entry under 90 of the First Schedule to the KGST Act which

specifies a higher rate of tax at eight per cent, in respect of oils--edible or inedible including refined or hydrogenated oils) and that "margarine" is not mentioned elsewhere in the said Schedule or in the Second Schedule. The verdict passed by a Division Bench of this court in [State of Kerala Vs. Aluva Sugar Agency](#), holding that margarine was to attract higher rate of tax, (as it was not liable to be treated as edible oil because of the nature and difference in use) was reversed by the apex court as per the decision in [Aluva Sugar Agency Vs. State of Kerala](#), holding that "margarine" was of course liable to be treated as "edible oil" attracting concessional rate of tax, by virtue of the exemption carved out from the rest. It is in the said circumstance, that the decision rendered by the Division Bench in [SSD Oil Mills Co. Ltd. Vs. State of Kerala](#), with reference to the provisions in the KVAT Act is sought to be re-considered, applying the ratio of the decision rendered by the apex court in [Aluva Sugar Agency Vs. State of Kerala](#), . Brief facts of the case:

2. The above writ petitions have been filed mainly challenging the assessment orders/penalty orders passed by the concerned authority for different assessment years, and also challenging the "clarification" issued by the competent authority under section 94 of the KVAT Act, declaring that "margarine" is liable to attract a higher rate of tax, by virtue of entry 64(8) of the relevant notification. The said clarification is stated as already under challenge in O.T.A.P. 7 of 2012 (Foods, Fats and Fertilizers Ltd. v. Commissioner, Office of the Commissioner, Commercial Taxes) before the Division Bench of this court. It is stated that, by virtue of the clarification issued by the competent authority under the said Act, the alternative remedy by way of appeal, as provided under the statute, can only be nugatory or futile, which is stated as the reason for approaching this court, challenging the assessment/penalty orders. In the meanwhile, taking note of the fact that the legal position has already been declared by the Division Bench of this court as per the decision in [SSD Oil Mills Co. Ltd. Vs. State of Kerala](#), and in view of the specific bar created by virtue of section 94(4) of the Act, the competent authority realised the mistake in having issued the clarification and has withdrawn the same, as per the proceedings dated December 23, 2013, which is also subjected to challenge in some of the cases, contending that the competent authority does not have any "power of review" to cancel or modify the earlier order dated October 9, 2012.

3. A detailed statement has been filed from the part of the respondents in some of the cases. It is conceded from both the sides, that there is no dispute with regard to the factual aspects and that the dispute is only with regard to the question of law involved. It is also pointed out that, though this court had relegated the aggrieved parties to avail of the statutory remedy at different points of time, also with reference to the decision rendered by this court in [SSD Oil Mills Co. Ltd. Vs. State of Kerala](#), and the subsequent verdict passed by the apex court in [Aluva Sugar Agency Vs. State of Kerala](#), , the matter requires to be considered on merits, to have an authentic pronouncement of law, particularly as to the effect of the verdicts passed by the Division Bench of this court and the apex court as mentioned above, so as to

solve the situation once and for all, to be followed by the departmental authorities/concerned Tribunal. As agreed by both the sides, all the writ petitions were heard on merits, at length, on different dates.

Case of the petitioners:

4. Mr. Mayankutty Mather, learned counsel for most of the petitioners addressed the court on behalf of the petitioners, referring to the genesis of the dispute, the clarification issued by the competent authority in different States involving similar disputes, the verdicts passed by different High Courts and also the decisions rendered by the apex court in connection with the issue involved. Particulars of the entries under different Schedules and description of the commodities/items with reference to the HSN Code, as given in the Customs Tariff Act, and the relevance of various communications governing the field were explained in detail. The crux of the submissions is that, margarine is of two different types--one, table-margarine and the other one, industrial/bakery margarine. All the petitioners are dealing with "industrial margarine" made from exclusively vegetable oils, which stands on a different footing than "table margarine" made of refined vegetable oils and skimmed milk powder (with such other ingredients). It is contended that all the items coming under entry 64 are "milk products" and that the "margarine" mentioned under entry 64(8) can only be "table margarine" (i.e., made by skimmed milk and vegetable oil). It is conceded that there is no dispute for any of the petitioners, that by virtue of the entry 64(8) of the relevant notification issued by the Government under section 6(1) of the KVAT Act, "table margarine" attracts higher rate of tax as specified. But in the case of "industrial/bakery margarine", it still remains to be an edible oil, as made clear by the apex court in [Aluva Sugar Agency Vs. State of Kerala](#), and hence can attract only a lesser rate of tax at four per cent.

Grounds of challenge:

5. The following vital points are projected by the learned counsel for the petitioners, to call for interference.

-- Industrial/bakery margarine is manufactured exclusively making use of edible hydrogenated vegetable oils, which do not contain any skimmed milk powder, unlike table margarine.

-- Edible oils stand included in the Third Schedule with tax liability of five per cent, (prior to April 1, 2012, it was four per cent, and from April 1, 2012, this entry was shifted to the Second Schedule with tax liability at the rate of one per cent, and from April 1, 2014, it is stated as proposed to be re-transferred to the Third Schedule).

-- All the items under entry 64 of the Notification issued under section 6(1) of the KVAT Act are milk products, whereas industrial/bakery margarine is not a milk product and hence, it is to be retained and assessed as an "edible oil" under entry 38(19)(d) of the Third Schedule to the KVAT Act.

-- Industrial margarine is liable to be included under the Head-- "Others including vanaspau" with HSN Code 1516.20.91. Applying the Rules of Interpretation, six digit HSN classification excludes whatever said earlier under four digit head, being more specific and "eight" digit code makes it exclusive.

-- The reliance placed by the departmental authorities, to fix higher rate of tax to "industrial margarine" with reference to HSN Code 1517.10, is without any basis, for the reason that the word "hydrogenated" does not appear anywhere under the code heading "1517" and hence the petitioners' product (made of hydrogenated vegetable oil) stands on a different footing.

-- The decision in [SSD Oil Mills Co. Ltd. Vs. State of Kerala](#), passed by the Division Bench of this court refers only to HSN Code 1517 and that no reference is made to HSN Code 1516, which deals with animal or vegetable fats and oils and their fractions or wholly hydrogenated, interesterified, re-esterified or elaidinised, whether or not refined but not further prepared.

-- Hydrogenated oil is included under HSN Code 1516 and not under 1517, though the word "margarine" only appears under HSN Code 1517.

-- The petitioners' product is similar to "vanaspau" and since vanaspati is taxable only at a lesser rate of four per cent/five per cent, the same is to be applied in the case of "industrial margarine" as well.

-- The verdict passed by the Division Bench of this court in [State of Kerala Vs. Aluva Sugar Agency](#), fixing a higher rate of tax to "margarine" with reference to its use (for not being directly used by consumer) has been reversed by the apex court as per the decision in [Aluva Sugar Agency Vs. State of Kerala](#), holding that industrial margarine is liable to be treated as an edible oil for granting concessional rate of tax.

-- Though the decision rendered by the apex court in [Aluva Sugar Agency Vs. State of Kerala](#), is under the KGST Act, the "ratio decidendi" is liable to be followed with regard to the present dispute under the KVAT Act as well. Reliance is sought to be placed on the decision rendered by the apex court in [Bharat Sanchar Nigam Ltd. and Another Vs. Union of India \(UOI\) and Others](#),.

-- Applying the principle of "noscitur a sociis", as explained by the apex court in [Rainbow Steels Ltd. Muzaffarnagar and Birla Cotton Spinning and Weaving Mills Ltd., Delhi Vs. C.S.T., U.P. and State of U.P.](#), the commodity of industrial margarine, being a hydrogenated vegetable oil, is entitled to be put together with "vanaspati", attracting a lesser rate of tax.

-- "HSN Code" is not the last word, and it is for the courts to interfere in appropriate cases.

-- The Chief Food Inspector has clearly certified (as per exhibits P5 in W.P. (C) No. 3850 of 2014 and similar certificates in other cases) that "industrial margarine" is entirely different from "table margarine" made out of milk fat with vegetable oil, a consumer product coming under milk products, though both are margarine.

-- Similar contention of the petitioners, raised by the assessee before the concerned Tribunal in Mumbai, was accepted by the said Tribunal, fixing lesser rate of tax as applicable to edible oils, which stands confirmed by the High Court of Mumbai.

-- The competent authority in the State of Andhra Pradesh has clarified that, though "table margarine" will attract a higher rate of tax, "industrial margarine" will attract only a lesser rate of tax, being an edible oil (exhibits P6 in W.P. (C). No. 3850 of 2014.)

-- The competent authority of Delhi has clarified that "industrial margarine" made of vegetable oil will attract only a lesser rate of tax.

-- This court has granted absolute stay of recovery proceedings, while directing the appellate authority to finalise the matter in accordance with law.

-- Exhibits P1(a) clarification dated December 23, 2013 withdrawing exhibits PI clarification dated October 9, 2012 (both in W.P. (C). 3850 of 2014) is beyond the power of the competent authority (having no power to review) and further, it is without giving any opportunity of hearing, as the petitioners were never made parties to the said proceedings; thus in violation of the principles of natural justice.

Defence of the respondents:

6. Mr. George Mecheril, the learned Special Government Pleader (Taxes) summarised the following points on behalf of the State/Department:

-- The law declared by the apex court in [Aluva Sugar Agency Vs. State of Kerala](#), is under the KGST Act and the notification thereunder, and not under KVAT Act or any notification thereunder.

-- The law stands already declared by a Division Bench of this court in favour of the Revenue, as per the decision in [SSD Oil Mills Co. Ltd. Vs. State of Kerala](#), holding that "margarine" in any form (whether it be industrial margarine or table margarine) is liable to attract the higher rate of tax, by virtue of entry 64(8) of the notification issued under the relevant provisions of the KVAT Act.

-- Existence of the said decision was never brought to the notice of the apex court when the decision in [Aluva Sugar Agency Vs. State of Kerala](#), was rendered with reference to the provisions of the KGST Act, nor is there any reference in the said verdict passed by the apex court to the "HSN Code" under the Customs Tariff Act or the relevant entries therein.

-- There is no inconsistency between the decisions rendered by the Division Bench of this court in [SSD Oil Mills Co. Ltd. Vs. State of Kerala](#), and the one rendered by the apex court in [Aluva Sugar Agency Vs. State of Kerala](#), which stands on a different pedestal, dealing with a different factual scenario.

-- The challenge against the clarification issued by the competent authority under section 94 of the KVAT Act is not maintainable by way of a writ petition, as the remedy, if aggrieved, is only to file an appeal, by virtue of the mandate under section 62(1) of the KVAT Act, read with rule 80 of the KVAT Rules, 2005.

-- Reliance is sought to be placed on the decision rendered by the apex court in [Babu Verghese and Others Vs. Bar Council of Kerala and Others](#), to contend that, when the statute prescribes something to be done in a particular manner, it can be done in that manner alone.

-- The entire taxing system in the State of Kerala has undergone a major change with effect from April 1, 2005 and as such, the declaration made by the apex court in [Aluva Sugar Agency Vs. State of Kerala](#), with reference to the KGST Act and the notification issued thereunder is not applicable.

-- If HSN Code is available, the Rules of Interpretation require to have the matter interpreted with reference to the description under the HSN Code under the Customs Tariff Act. Reliance is sought to be placed on the decision in Reckitt Benckiser (India) Ltd. v. Commissioner, Commercial Taxes [2008] 15 VST 10 (SC).

-- The petitioners' contention that their product (industrial/bakery margarine) has to be grouped under HSN Code "1516.20.91" is absolutely wrong and unfounded, as discernible from the other entries grouped therein, whereas the specific entry given under HSN 1517.10 deal with "margarine" other than "liquid margarine".

-- The petitioners do not have any consistent case with regard to the stand taken earlier and the present stand as discernible from paragraph 3 of W.P. (C.) No. 3850 of 2014.

Manufacture of "hydrogenated vegetable oil" is by adding raw material of til oil/sesame oil-which falls under HSN Code 1515.10, to the refined groundnut oil in the fixed proportion of 20 : 80 and as such, it is a mixture of til oil and groundnut oil, giving birth to the product margarine falling under the HSN Code 1517.10.

-- The commodity margarine is not mentioned anywhere in the Second or Third Schedule, but stands included under entry 64(8) of the relevant notification, which is having the HSN Code of 1517.10.

-- The distinction sought to be made between "table margarine" and "industrial/bakery margarine", with reference to its "use", is not correct, in view of the ruling rendered by a Full Bench of this court in [Kevi Hardware Vs. State of Kerala](#), holding that "user test" is not safe.

-- The only question considered and decided by the apex court in [Aluva Sugar Agency Vs. State of Kerala](#), was, whether margarine was eligible to have concessional rate of tax as applicable to edible oil or not. The apex court has not declared that margarine is the same as vanaspati, or that both are liable to be treated as the same commodity.

-- The State decision to reckon margarine attracting higher rate of tax, at the rate of 13.5 per cent with effect from April 1, 2005 while retaining "vanaspati" in the Third Schedule with a lesser tax liability, is a matter of "policy" and hence is not liable to be interfered.

Though a review petition was filed by the assessee by way of RP No. 797 of 2013, seeking to review the verdict passed by the Division Bench of this court in [SSD Oil Mills Co. Ltd. Vs. State of Kerala](#), the same stands dismissed as per the order dated November 18, 2013.

7. As mentioned hereinbefore, the main reason put forth by the petitioners for having approached this court, challenging the assessment/penalty orders, is because of pendency of OTAP No. 7 of 2012 (Foods, Fats and Fertilizers Ltd. v. Commissioner, Office of the Commissioner, Commercial Taxes), wherein exhibit P1 clarification (in W.P. (C) No. 3850 of 2014) issued by the competent authority under section 94 of the KVAT Act was subjected to challenge. It is pointed out that, appellate remedy will not be an effective remedy under such circumstance, as the appellate authority is always bound by the "clarification order" issued by the competent authority, by virtue of the mandate under section 94(5) of the Act. It is now brought to the notice of this court that, exhibit P1 clarification order was issued by the concerned authority without taking note of the declaration of law by the Division Bench of this court in [SSD Oil Mills Co. Ltd. Vs. State of Kerala](#). By virtue of section 62(1) of the Act, read with rule 80 of KVAT Rules, no power or jurisdiction was vested upon the concerned authority to have issued exhibit P1 clarification order, in view of the verdict already passed by this court and as such, it was rightly withdrawn as per the subsequent order dated December 23, 2013 (produced as exhibit P1(a) in W.P. (C) No. 3850 of 2014.). Recording the turn of events as above, the OTAP, itself has been closed by the Division Bench of this court, leaving open all the contentions, as per the judgment dated February 19, 2014. Further, since the challenge raised by the parties concerned, against exhibit PI clarification, does no more survive, for having it withdrawn as per exhibit P1(a) proceedings dated December 23, 2013, they cannot have any legally redressable grievance against exhibit P1(a) order, whereby exhibit P1 clarification order was withdrawn. As such, the challenge raised against exhibit P1/P1(a) in W.P. (C) No. 3850 of 2014 and such other writ petitions is not liable to be entertained by this court, since the cause of action no more subsists/survives.

8. To understand the scope of the judgment rendered by the apex court in [Aluva Sugar Agency Vs. State of Kerala](#), a brief reference to the factual position is

necessary. Margarine was taken to be one of the items falling under entry 90 of the First Schedule to the KGST Act, which was put together with oils, edible or inedible, including refined or hydrogenated oils, with a tax liability at eight per cent. Subsequently, the Government thought it fit to reduce the tax in respect of "edible oils" and accordingly, as per entry 17A of the Second Schedule of SRO No. 1728 of 1993, the rate of tax in respect of "edible oils" was reduced from eight per cent, to four per cent. The assessing authority fixed the liability, reckoning higher rate of tax of eight per cent, for "margarine", as the benefit of exemption was limited only to "Edible oils", observing that margarine was a different commodity. In the course of further proceedings, the concerned Tribunal rendered a decision in favour of the assessee, holding that "bakery margarine" sold by the assessee was hydrogenated oil like "vanaspati" and hence was eligible for concession under the notification. This was sought to be challenged by the State before this court by filing a revision petition, leading to the decision reported in [State of Kerala Vs. Aluva Sugar Agency, .](#)

9. The Division Bench of this court observed that use of bakery margarine was only for bakery/confectionary industries and that the manufacturers had specifically prohibited use of the item for any other purpose. It was also observed that, it was not directly consumable unlike "vanaspati" or such other edible oils; and further that, although hydrogenated oil or refined oil can also be used for bakery or confectionary industries, the reverse is not true, in so far as margarine, exclusively made for use in bakery or confectionary industries, cannot be treated as "edible oil" and the same cannot be used for all purposes for which edible oil is used. When a doubt was expressed, whether margarine would come within the purview of "edible oils" to get concessional rate of tax, the position was explained by the Government, pointing out that it was applicable in respect of items such as groundnut oil, gingelly oil and vanaspati. A Division Bench of this court gave a restrictive meaning to the above clarification, confining the same to the specified item and held that "margarine" was not similar to the said items and hence was exigible to higher rate of tax, having been included under entry 90 of the First Schedule to the KGST Act [State of Kerala Vs. Aluva Sugar Agency, .](#)

10. On challenging the said verdict before the apex court in [Aluva Sugar Agency Vs. State of Kerala, .](#), the short question considered was, whether sale of margarine was to be taxed at eight per cent, or four per cent, under the provisions of the KGST Act/notification under the said Act. The honourable Supreme Court observed that, the expression used in the Government Notification issued by way of clarification, using the words "such as groundnut oil, gingelly oil and vanaspati" was only illustrative and not exhaustive. It was noted (after hearing both the sides), that the main issue for adjudication in the appeal was whether "margarine" can be treated as an "edible oil" and thus would fall under entry 17A of the Second Schedule to the KGST Act, to have concessional rate of tax. After observing that "margarine" was a generic term and it was used as a substitute for butter, the Bench noted that, "bakery margarine" manufactured by the appellant was only from vegetable oil.

Taking note of the contents of margarine, it was held that, it contained all edible things and as such, "margarine" was also an edible oil, though not used for normal cooking as other oils like "coconut oil", "sunflower oil", "soyabean oil", "sesame oil", etc. It has been observed by the Bench that, as margarine is not used for normal cooking, but still is used for preparing bakery products, a doubt prevailed, whether margarine could be considered as "edible oil", under which circumstance, the Government had issued Circular No. 2439/83/96/TD dated February 19, 1996 (which has been extracted in the judgment), clarifying the position. On going through the circular extracted by the apex court, it is seen that the doubt referred to and considered by the Government was, whether hydrogenated oil like "vanaspati" would come within the concessional rate (paragraph 2 of the circular). It was accordingly clarified, that the term edible oil mentioned in the relevant notification, granting concessional rate of tax, also included refined or hydrogenated oil, such as groundnut oil, gingelly oil, refined oil and vanaspati (without mentioning anything specifically about margarine). It was with reference to the above clarification, that the apex court observed that the definition of the term "edible oil" given in the circular was not exhaustive but illustrative, and further that the circular did not say, that only edible oil referred to in the said circular would be taxed at four per cent. The Bench observed that, one has to consider whether margarine can be considered as an edible oil, pointing out that "edible oil" is one which could be used for human consumption; simultaneously making it clear that, it is not necessary that all edible things should be consumed in the form in which they are available. It was also mentioned that, there are several ingredients in cooking, which we do not consume in the same form, but they are used in preparation of food articles which are consumed. Observations in the concluding paragraphs are relevant, which hence are extracted below (pages 8 and 9 in 45 VST):

"Upon perusal of the circular dated February 19, 1996, explaining the term "edible oil", we find that the intention of the Government was to give relief in tax to edible oils. So as to clarify the doubt, it has been specifically stated in the said circular that edible oils would also include hydrogenated oils such as groundnut oil, gingelly oil, refined oil and vanaspati oil. The aforesaid circular clarified that hydrogenated edible oil like vanaspati oil should be treated as edible oil. In our opinion, the Tribunal was right when it came to the conclusion that margarine should be taxed at four per cent, as it is edible oil.

For the aforementioned reasons, we are of the view that the conclusion arrived at by the Tribunal to the effect that margarine is an edible oil is correct and therefore the appellant is entitled to the benefit of reduced rate of four per cent."

11. Coming to the decision of the Division Bench of this court in [SSD Oil Mills Co. Ltd. Vs. State of Kerala](#), the issue considered was entirely different from the issue which was considered by the Bench earlier in [State of Kerala Vs. Aluva Sugar Agency](#), (which in turn was considered by the apex court reversing the decision, as per the

decision in [Aluva Sugar Agency Vs. State of Kerala](#), . Admittedly, the issue in [SSD Oil Mills Co. Ltd. Vs. State of Kerala](#), was as to the rate of tax of "margarine", with reference to entry 64(8) (HSN Code 1517.10), whether it was taxable at the rate of 12.5 per cent, under the Notification SRO 82/2006 issued by the Government under section 6(1)(d) of the KVAT Act, or was it to be considered as an item falling under entry 38(19)(d) of the Third Schedule of the KVAT Act providing for lesser tax in respect of other edible oils including "vanaspati", as claimed by the assessee. Though the decision rendered earlier (with reference to KGST Act) in [State of Kerala Vs. Aluva Sugar Agency](#), was referred to, it was noted that the specific case of the assessee was that, the entries contained in the Schedule and in the notification under the KVAT Act were different from those contained under the KGST Act considered by the court earlier and it was accordingly, that the matter was heard on merits.

12. After referring to the different entries under the KVAT Act and the notification thereunder, and also after making reference to the different HSN Code assigned to the different commodities under the Customs Tariff Act, the Bench observed that all forms of "margarine" would come within the purview of entry 64(8) of SRO 82/2006 attracting higher rate of tax. The case of the assessee (as in the case of the present petitioners) that "bakery margarine" dealt with by the concerned assessee was different, not being a milk product, was also taken note of and a positive finding was rendered, that the contention of the assessee that his product fell under entry 38(19)(d) of the Third Schedule of the KVAT Act could not be accepted, because none of the items covered by sub-entry (19) had the same HSN code of "margarine" as provided under the Customs Tariff Act. The observations of the Bench in the penultimate paragraph and the paragraph immediately preceding the same, are relevant, which are extracted below (pages 597 and 598 in 37 VST):

"From the above it is very clear that under the description of commodities, the HSN code for margarine is 1517.10. The contention of the petitioner that the item falls under entry 38(19)(d) of the Third Schedule to the KVAT Act cannot be accepted because none of the items covered by the sub-entry (19) has the same HSN code for margarine provided in the Customs Tariff. In fact it is clear from entry 38(19) that all four items referred to there are covered under six digit HSN 1516.20. We are of the view that the petitioner's contention that margarine falls under other edible oils falling under entry 38(19) is incorrect and unacceptable. We, therefore, hold that margarine in all forms fall under HSN code 1517 under the Customs Tariff and consequently it is covered by entry 64(8) of SRO No. 82/06, which has the same HSN Code taxable at 12.5 per cent.

8. Counsel for the petitioner has raised a contention that margarine referred to in entry 64(8) of SRO No. 82/06 is only margarine made with one of the milk products as an ingredient. Of course, entry 64 of SRO 82/06 covers generally milk products and table margarine is made with skimmed milk as one of the ingredients.

Therefore, according to him, only certain forms of margarine, which are milk products only are covered by specific entry for margarine under entry 64(8) of SRO 82/06. However, the question to be considered is whether the Legislature, while framing Third Schedule intended margarine to be covered by entry 38 of the Third Schedule of the Act under the head "edible oil", no matter margarine in certain forms are made from edible oils through hydrogenation. In this context, we have already referred to the relevant entry of the Customs Tariff Act where margarine is specifically covered under HSN code 1517 and 1517.10. It is pertinent to note that Customs Tariff Act draws distinction only between margarine of vegetable and animal origin and its physical form, that is, solid form and liquid form. However, the Third Schedule to the KVAT Act covers only various vegetable oils, including its hydrogenated form, that is, vanaspati. Margarine certainly cannot fall under this category because, it is not vanaspati or hydrogenated oil. Further, none of the items covered by HSN 1517 of the Customs Tariff Act, which covers margarine, is included under entry 38 of the Third schedule to the KVAT Act. We are, therefore, of the view that the Legislature never intended margarine to be covered along with oils under the Third Schedule. On the other hand, margarine in all its forms are covered by entry 64(8) of the Third Schedule to the KVAT Act, which has the same HSN Code for margarine contained in the Customs Tariff Act."

13. According to the petitioners, the ingredients of "industrial or bakery margarine" are edible vegetable oils (palm oil, palmolin, ricebran oil, sesame oil), water, salt, vitamin A, emulsifying agents and antioxidants. The manufacturing process involves various stages including hydrogenation and/or interesterification, deodorisation and emulsification. In the case of table margarine, the ingredients are, refined vegetable oils, water, common salt, skimmed milk powder, emulsifiers and stabilisers, acid regulators, starch, vitamin A, D and E. The difference, with regard to the nature and process, between "vanaspati" and "margarine" is mainly to the effect that, in the case of margarine, apart from the process of hydrogenation (which is common), there is a process of "emulsification" as well, "vanaspati" is almost in grainy form, whereas "industrial margarine" is in pasty form.

14. To have a better analysis as to the nomenclature of the concerned items under the Customs Tariff Act, it will be worthwhile to extract the entries with HSN code 1516 and 1517, respectively, as given below:

HSN 1516

Animal or vegetable fats and oils and their fractions, partly or wholly hydrogenated, inter-esterified, re-esterified or elaidinised, whether or not refined, but not further prepared.

HSN 1517.

Margarine; edible mixture or preparations of animal or vegetable fats or oils or of fractions of different fats or oils of this chapter, other than edible fats or oils or their

fractions of heading 1516.

15. The heading of entry 1516 reveals that, it could be animal or vegetable fats and oils and their fractions, partly or wholly hydrogenated, inter-esterified, re-esterified or elaidinised, whether or not refined, but not further prepared. The entries given therein, with appropriate sub-classification, is subject to a qualification that it is not further prepared except to the extent as specified therein, i.e., partly or wholly hydrogenated, inter-esterified, re-esterified or elaidinised, whether or not refined.

16. The process of "emulsification" is not at all mentioned with regard to the entries under the Head 1516. "Emulsification" means the process by which, the commodity is changed into an emulsion, which is relatively a stable suspension of one liquid, minutely dispersed in another, in which it is not soluble. This clearly means, it becomes a "mixture" of two or more different entities, which do not maintain the exclusive characteristics of a particular item, but have joined together to give rise to the new product. It is for this reason, that such product like "margarine" has been separately enlisted under the Head 1517, showing it as an edible mixture or preparation of animal or vegetable fats or oils or of fractions of different fats or oils of the concerned chapter, other than edible fats or oils or their fractions of heading 1516. Unlike "margarine", all other items mentioned under the Head 1516 retain their basic traits as animal fats or oils, vegetable fats or oils, though hydrogenated, inter-esterified, re-esterified, refined or not refined, etc. This being the position, the product "margarine", whether it is "table margarine" or "industrial margarine", does not make a difference and it has to be interpreted with reference to the HSN code given under the Head-517; more so, in view of the Rules of Interpretation of Schedules, under the Appendix to the Customs Tariff Act. It is also relevant to note that, animal or vegetable fats and oils (hydrogenated or otherwise), dealt with as specified, are grouped together under the Head 1516, from which an exception has been carved out in respect of margarine, which forms an edible mixture or preparation of animal or vegetable fats or oils, as given under the Heading 1517. The six digit nomenclature of margarine under the HSN Code 1517.10 gives a further exclusion, in so far as liquid margarine is concerned. In other words, all types of margarine, except liquid margarine, stand specifically included under the HSN Code 1517.10. This being the position, the entry "margarine", as given under the entry 64(8) of SRO 82/06 deals with all sorts of margarine, whether it be "table margarine" or "bakery margarine". The version of the petitioners, to the contrary, is liable to be rejected.

17. Yet another important aspect to be noted is that, the petitioners themselves have made available the distinctive characters of "table margarine" and "bakery/industrial margarine", in so far as Food Safety and Standards (Foods Products Standards and Food Additives) Regulations, 2011 are concerned. Under Regulation 2.2.5(1), it is stated that "table margarine" means an emulsion of edible oils and fats with water, which shall be free from rancidity, mineral oil and animal

body fats. It may contain common salt not exceeding 2.5 per cent, food additives permitted in these regulations and appendices and skimmed milk powder not exceeding two per cent. Similarly, under regulation 2.2.5(2), "bakery and industrial margarine" means, an emulsion of vegetable oil product with water, which shall be free from added colour and flavour, rancidity, mineral oil and animal body fats. It may contain common salt not exceeding 2.5 per cent, food additives permitted in the regulations and appendices and shall, conform to the specified standards. From the above, it is clear that, in the cases of both "table margarine" and "industrial margarine", it shall be free from animal body fats and the permissible level of skimmed milk powder in the case of "table margarine" is only to an extent of 2.5 per cent. Now, the question is, whether by adding skimmed milk powder to an extent of 2.5 per cent, the nature of the product will get changed, to have a lesser rate of tax, based on the "use" and categorisation as "table margarine" and "industrial/bakery margarine", respectively; which can only be answered in the negative; in view of the law declared by the apex court in [Aluva Sugar Agency Vs. State of Kerala](#), (reversing the decision of the Division Bench of this court in [State of Kerala Vs. Aluva Sugar Agency](#), and also by the Full Bench of this court in [Kevi Hardware Vs. State of Kerala](#), holding that "user test" is not the proper course.

18. It is equally important to note, that the present distinction sought to be made by the petitioners claiming the benefit of lesser rate of tax, is also paradoxically with reference to user of the product. The petitioners concede that there is no dispute with regard to "table margarine" which attracts higher rate of tax, by virtue of entry 64(8) of SRO 82/2006. But according to them, "industrial/bakery margarine" stands on a different footing. The said proposition virtually stands diametrically opposite to the law declared by the apex court as per decision in [Aluva Sugar Agency Vs. State of Kerala](#), and of the Full Bench of this court in [Kevi Hardware Vs. State of Kerala](#),, as discussed herein before. It was declared by the Division Bench of this court in [State of Kerala Vs. Aluva Sugar Agency](#), that "margarine" cannot be directly consumed, unlike other edible oils used for cooking and the distinction was sought to be made with reference to the "use". The said course with reference to "use" was deprecated by the apex court in [Aluva Sugar Agency Vs. State of Kerala](#),, holding that the question was not the "use" to which the oil is put, but whether the oil is edible, to have extended the concessional rate of tax as given in the notification. This being the position, the petitioners cannot turn back to "user theory", to have differential treatment with regard to "table margarine" and "bakery/industrial margarine"; more so, when no such distinction is discernible from entry 64(8) of SRO No. 82/2006.

19. In the above facts and circumstances, this court finds that there is absolutely no inconsistency between the decisions rendered by the Division Bench of this court in [State of Kerala Vs. Aluva Sugar Agency](#), and that of the apex court in [Aluva Sugar Agency Vs. State of Kerala](#),, which declares the law, scope, extent and application as to the actual rate of tax in different contexts. This court also finds and declares that, by virtue of entry 64(8) of SRO No. 82/2006 and the description of the commodity

with HSN Code 1517.10, all margarine, except liquid margarine, are liable to attract higher rate of tax and there cannot be any distinction between "table margarine" and "industrial/bakery margarine", as no such separation is intended or provided under the said entry, being not the intention of the law makers. The challenge raised by the petitioners with regard to rate of tax and the resultant assessment orders and orders imposing penalty, is not correct or sustainable and the same stands repelled. The writ petitions are dismissed accordingly. However, it is made clear that, the declaration of law is with regard to the actual "rate of tax" payable in respect of the commodity "margarine" (industrial/bakery margarine as well as table margarine). Other disputes, if any, with regard to the procedure for fixation of tax/penalty or its quantum are left open. If any grievance is there in respect of these limited aspects, it is open for the petitioners to pursue the matter by way of appropriate proceedings before the statutory authorities.