GST/CST & VAT: Uttar Pradesh VAT - Product 'Sharbat Rooh Afza' is neither a 'fruit drink' nor a 'fruit juice' nor a 'processed fruit' but it is an unclassified item falling under Residuary Entry No. 1 of Schedule V of Uttar Pradesh VAT Act

[2018] 95 taxmann.com 270 (Allahabad)

HIGH COURT OF ALLAHABAD

Hamdard (Wakf) Laboratories

v.

Commissioner of Commercial Taxes*

SURYA PRAKASH KESARWANI, J.
SALES/TRADE TAX REVISION NOS. 457 TO 462, 464 TO 469 AND 617 OF 2012 AND OTHERS
JULY 2, 2018

Classification of goods - Residuary Entry No. 1 of Schedule V, read with Entry No. 103 of Part A of Schedule II, of the Uttar Pradesh Value Added Tax Act, 2008 - Sharbat Rooh Afza (OR) - Period 2007-08 and 2008-09 - Assessee was engaged in manufacture of a product 'Sharbat Rooh Afza' - It claimed that said product was classifiable under Entry No. 103 of Part A of Schedule II of Uttar Pradesh VAT Act being 'fruit drink' or 'fruit juice' or 'processed fruit' - Whether product in question was neither a 'fruit drink' nor a 'fruit juice' nor a 'processed fruit' - Held, yes - Whether said product was an unclassified item falling under Residuary Entry No. 1 of Schedule V of VAT Act - Held, yes [Para 29] [In favour of revenue]

Circulars and Notifications: Notification No. 7421, dated 26-10-1981

FACTS

- The assessee was engaged in the manufacture of a product 'Sharbat Rooh Afza'. It claimed that the said product was classifiable under Entry No. 103 of Part A of Schedule II of the Uttar Pradesh VAT Act, 2008 being 'fruit drink' or 'fruit juice' or 'processed fruit'.
- The lower authorities disallowed the assessee's claim and held that the product in question was neither 'fruit juice' nor 'fruit drink' nor 'processed fruit'. It was an unclassified item falling under Residuary Entry No. 1 of Schedule V of the VAT Act.
- On revesion, the assessee contended that the product 'Sharbat Rooh Afza' was not an unclassified commodity falling under Residuary Entry No. 1 of Schedule V of the VAT Act. Rather it was classifiable under Entry No. 103 of Part A of Schedule II of the VAT Act being 'fruit drink' or 'processed fruit' liable to tax at the rate of 4 per cent.
- The revenue, on the other hand, submitted that the product 'Sharbat Rooh Afza' was covered by Residuary Entry No. 1 of Schedule V of the VAT Act.

HELD

- Entry No. 103 of Part A of Schedule II of the VAT Act reads as: 'Processed or preserved vegetable & fruits including fruit jams, jelly, pickle, fruit squash, paste, fruit drink & fruit juice (whether in sealed containers or otherwise)'. [Para 8]
- Residuary Entry No. 1 of Schedule V of the VAT Act reads as: 'All goods except goods mentioned or described in Schedule I, Schedule II, Schedule III and Schedule IV of this Act.' [Para 9]
- The product 'Rooh Afza' is being manufactured by the assessee under licence granted by the licencing authority under the provisions of the Fruit Products Order, 1955. In the licence the description of product manufactured by the assessee is mentioned as 'Synthetic Sarbat, fruit syrups and squashes'. [Para 12]
- It appears from perusal of the aforesaid licence that it was granted in the year 1972 and it continued to be renewed. During the year 2002 and thereafter, the authorisation for manufacture of goods was specified as: 'Fruits syrups, squashes from purchased fruit juice/pulp, non fruit syrups/sarbat'. [Para 13]
- It appears that an information was sought by the Commissioner-cum-Principal Secretary, Commercial Tax Department, Bihar from the Food Safety and Standards Authority of India as to whether 'Rooh Afza' falls under heading of fruits drinks/fruit juice/fruit squash/fruit paste or not. The Assistant Director General (PFA), Food Safety and Standards Authority of India, New Delhi, *vide* letter dated 31-7-2009 submitted the information as follows: 'Sharbat Rooh Afza may be treated as Non Fruit Syrup containing 10% Fruit Juice (Volume by Volume.)'. [Para 14]
- As per lable being wrapped on the bottles of 'Sharbat Rooh Afza', the product 'Rooh Afza' has been represented to customers as 'Sharbat Rooh Afza' 'a non alcoholic sweetened beverage'. [Para 15]
- In the case of *Ashutosh Trading Co.* v. *CCT* [Appeal No. 56 of 2010, dated 9-3-2011] the Full Bench of the Tribunal considered in detail the question of classification of the product 'Sharbat Rooh Afza' and recorded a finding of fact that it is an unclassified item liable to tax at the rate of 12.5 per cent. The Tribunal also held that in common parlance and in commercial parlance the product in question is known as 'Sharbat Rooh Afza' and on demand by customers for 'Sharbat Rooh Afza' the shopkeeper shall supply only 'Sharbat Rooh Afza'. If a customer demands for 'fruit drink' no shopkeeper shall give him 'Sharbat Rooh Afza'. In the case of *Hamdard (Wakf) Laboratories* v. *CST* 2005 NTN (Vol. 27) 35 the Allahabad High Court considered the question as to whether 'Sharbat Rooh Afza' is liable to tax as Syrup at the rate of 12 per cent under Notification No.7421, dated 26-10-1981, issued under the Uttar Pradesh Trade Tax Act, which specifically provided tax at the rate of 12 per cent on the point of sale turnover of 'Soda Water, Lamonada and other soft beverages and Syrups, Squashes, Jams and Jellies', and held that 'Sharbat Rooh Afza' being concentrate of Sugar is a 'Syrup' and falls under Notification No.7421, dated 26-10-81 and has been rightly taxed at the rate of 12 per cent. [Para 19]
- It is well settled that the application of common parlance test is an extension of general principles of interpretation of Statute for deciphering the mind of the law maker. In the absence of a statutory definition in precise term; words, entries and items in physical Statute must be construed in terms of their commercial or trade understanding or according to their popular meaning. In other words, they have to be constructed in the sense that the people conversant with the subject matter of the

Statute would attribute to it. Resort to rigid interpretation in terms of artificial and technical meaning should be avoided in such circumstances. However, this rule shall not be applicable when the legislature has expressed a contrary intention such as by providing a statutory definition of the particular entry, word or item in specific, scientific or technical terms, then interpretation ought to be in accordance with scientific and technical meaning and not according to common parlance understanding. A Sales Tax Statute being one levying tax on sales of goods must, in absence of technical term or a terms of science or art, shall be presumed to have been used in ordinary sense or common parlance. Technical and scientific tests offer guidance only within limits where a word has a scientific and technical meaning and also an ordinary meaning according to common parlance, it is the latter sense that in a taxing statute the word must be held to have been used, unless contrary intention is clearly expressed by the legislature. If in respect of a particular item an artificial meaning is attached to particular words in the taxing statute then the ordinary sense or dictionary meaning would not be applicable but meaning of that type of goods dealt with in that type of market should be searched. The process of manufacture of a product and the end use to which it is put cannot necessarily be determinative of the classification of that product under a fiscal statute. What is more important is whether the broad description of the article fits in with the expression used in the Tariff.... Moreover the functional utility and predominant or primary usage of the commodity which is being classified must be taken into account, apart from the understanding in common parlance. A Residuary Entry can be taken refuge of only in the absence of a specific entry. The word 'Fruit drink' and 'Fruit Juice' used in Entry No. 103 of Part A of the Schedule II to the VAT Act has neither been defined under the Act nor it has been used in technical sense. If a person asks for fruit Juice or fruit drink, he will not be given 'Sharbat Rooh Afza' and vice-versa. Therefore, the Tribunal has neither committed any error of law to apply common parlance test nor committed any error to record the findings of fact that 'Sharbat Rooh Afza' is not a fruit drink. [Para 25]

- The submission of the assessee relying upon the licence under the Food Products Order, 1955 or under the Food Safety and Standards Act, 2006 or the letter of the Assistant Director General (P.F.A.) dated 31-7-2009 do not support the case of the assessee. There was sufficient material on record including own documents/papers of the assessee which enabled the fact finding authorities to hold that 'Sharbat Rooh Afza' is not 'fruit drink' but an unclassified item. The submission of the assessee that since the Food Safety and Standards Authority of India has observed that 'Sharbat Rooh Afza' is a 'Non Fruit Syrup', therefore, it is a fruit drink; is wholly without substance and baseless inasmuch as in the letter dated 31-7-2009 the Assistant Director General (PFA) Food Safety and Standards Authority of India, New Delhi has observed that for a product to be 'Fruit Syrups' it must contain minimum 25 per cent 'Fruit Juice' which is not contained in the product 'Sharbat Rooh Afza' and, therefore, it is a 'Non Fruit Syrup'. Even in the licence for manufacture of the product in question, the assessee has been authorised to manufacture 'Non Fruit Syrup/Sharbat'. The product has been represented to buyers as 'Sharbat' which is evident from the label being wrapped on the bottles of 'Sharbat Rooh Afza'. The alternative submission that 'Sharbat Rooh Afza' is a 'Processed Fruit' is also totally baseless and without substance. Even as per licence to manufacture 'Sharbat Rooh Afza' it is 'Non Fruit Syrup/Sharabt'. Therefore, there does not arise any question for the 'Sharbat Rooh Afza' to be a 'Processed Fruit'. That apart no material has been brought on record by the assessee either before the fact finding authorities or before the High Court to indicate that 'Sharbat Rooh Afza' is a

'Processed Fruit'. [Para 26]

- As per own licence of the assessee granted under the Fruit Products Order, 1955, the product in question is 'non Fruit Syrup/Sharbat'. As per letter of the Assistant Director General (P.F.A.), Food Safety and Standards Authority of India, New Delhi, dated 31-7-2009, the product 'Fruit Syrup' has been defined in Part II of Second Schedule of FPO 1955 as the product which contains 65 per cent soluble solids and minimum 25 per cent fruit juice content in the product but from daily production record of the assessee manufacturing 'Sharbat Rooh Afza' and marketing it in the same brand name contains 10 per cent fruit juice (volume by volume) which is classified as per Part IV of the Second Schedule of FPO 1955 as 'Non Fruit Syrup' which is also indicated from the declaration on the label of this product. As per copy of the licence dated 22-1-2013, issued by the Designated Officer, Food Safety and Standards Authority of India, Ministry of Health and Family Welfare, Government of India, the assessee has been authorised to manufacture two products, firstly,Synthetic Sharbat and, Secondly,Fruit Syrups and Squashes. As per letter of the Food Safety and Standards Authority of India, dated 31-7-2009 the product 'Rooh Afza' is a 'Non Fruit Syrup'. [Para 27]
- A concurrent findings of fact have been recorded by the fact finding authorities including the Tribunal that 'Sharbat Rooh Afza' is not a fruit drink but an unclassified item. The assessee could not point out any perversity in the findings of fact recorded by the fact finding authorities instead it took an alternative stand that 'Sharbat Rooh Afza' is a 'processed fruit' which was not even argued by it before the Tribunal. [Para 28]
- In view of the aforesaid, it is evident that the product 'Sharbat Rooh Afza' is neither a fruit drink nor a fruit juice nor a processed fruit. Rather it is a 'Non Fruit Syrup/Sharbat' being a concentrated sugar syrup which is not specified in Schedules I, II, III and IV of the VAT Act. Therefore, it is unclassified item falling under the Residuary Entry No. 1 of Schedule V of the VAT Act. [Para 29]
- Therefore, the Tribunal has correctly held that the commodity 'Sharbat Rooh Afza' is an unclassified item falling under Schedule V of the VAT Act and liable to tax at the rate of 12.5 per cent. It is neither fruit juice nor fruit drink nor processed fruit. In common parlance it is known as Sharbat. Since the commodity 'Sharbat Rooh Afza' does not fall under any Entry in Schedules I, II, III and IV, it shall fall under the Residuary Entry No. 1 of Schedule V of the VAT Act. [Para 30]

CASE REVIEW

Ashutosh Trading Company v. *CCT* [Appeal No. 56 of 2010, dated 9-3-2011] (para 18) and *Hamdard (Wakf) Laboratories* v. *CST* 2005 NTN (Vol. 27) 35 (para 19) *followed*.

Hamdard Dawakhana (Wakf) v. *Union of India* AIR 1965 SC 1167 (para 18); *Hamdard (Wakf) Laboratories* v. *Collector of Central Excise* 1999 (113) ELT 20 (SC) (para 18) and *Parle Agro (P.) Ltd.* v. *Commissioner, Commercial Taxes* [2017] 7 SCC 540 (para 18) *distinguished*.

CASES REFERRED TO

Hamdard (Wakf) Laboratories v. *Collector of C. Ex* 1999 (113) ELT 20 (SC) (para 4), *Parle Agro (P.) Ltd.* v. *CCT* [2017] 7 SCC 540 (para 4), *Hamdard Dawakhana (Wakf)* v. *Union of India* AIR 1965 SC 1167 (para 4), *Hindustan Ferodo Ltd.* v. *Collector of Central Excise* 1996 taxmann.com 174 (SC) (para

4), *Bharat Forge & Press Industries (P.) Ltd.* v. *CCE* 1990 taxmann.com 124 (SC) (para 4), *Pepsico India Holdings (P.) Ltd.* v. *State of Assam* [O.T. Application No. 1 of 2007, dated 28-4-2009] (para 4), *Hamdard (Wakf) Laboratories* v. *CST* 2005 NTN Vol. 2735 (All.) (para 4), *Indo International Industries* v. *CST* 1981 UPTC 481 (SC) (para 6), *Ramavtar Budhaiprasad* v. *Asstt. STO* AIR 1961 SC 1325 (para 6), *CCE* v. *Shree Baidyanath Ayurved Bhawan Ltd.* 2010 NTN (Vol. 42) 63 (para 6), *R.K. Trading* v. *CTT Appellate Tribunal* 2015 NTN (Vol. 27) 3 (para 6), *CST* v. *Melrose Biscuit Co.* 2004 UPTC 1001 (SC) (para 6), *State of U.P.* v. *D.S.M. Group of Industries* [2003] 37 STR 171 (para 6), *Ashutosh Trading Co.* v. *CCT* [Appeal No. 56 of 2010, dated 9-3-2011] (para 19), *Mamta Surgical Cotton Industries* v. *Asstt. Commr. (Anti Evasion)* [2014] 43 taxmann.com 237/44 GST 397 (SC) (para 21), *CCE* v. *Connaught Plaza Restaurant (P.) Ltd.* [2012] 13 SCC 639 (para 22), *CCE* v. *Wockhardt Life Sciences Ltd.* 2012 (5) SCC 585 (para 23), *CCE* v. *Baidyanath Ayurved Bhawan Ltd.* [2009] 12 SCC 419 (para 24), *B.O.C. India Ltd.* v. *State of Jharkhand* [2009] 15 SCC 590 (para 24), *Godrej Industries Ltd.* v. *CCE* [2008] 8 SCC 600 (para 24), *Ponds India Ltd.* v. *Commissioner of Trade Tax* 2009 taxmann.com 934 (SC) (para 24), *U.P. State Agro Industrial Corpn. Ltd.* v. *Kisan Upbhokta Parishad* [2007] 13 SCC 246 (para 24), *Trutuf Safety Coal Industries* v. *CST* 2007 8 SCC 242 (para 24), *Craft Interiors (P.) Ltd.* v. *CCE* 2006 taxmann.com 1210 (SC) (para 24), *Parley Biscuits (P.) Ltd.* v. *State of Bihar* [2005] 9 SCC 669 (para 24), *Associated Cement Com. Ltd.* v. *State of M.P.* [2004] 9 SCC 72 (para 24), *Alpine Industries* v. *CCE* 2003 taxmann.com 2075 (SC) (para 24), *S. Samuel MD, Harrisons Malyalam* v. *Union of India* [2004] 1 SCC 256 (para 24), *Union Of India* v. *Harjeet Singh Sandhu* [2001] 5 SCC 593 (para 24, *Collector of Custom & CEx.* v. *Surendra Cotton Oil Mill Co.* [2001] 1 SCC 578 (para 24), *Pappu Sweets & Biscuits* v. *Commr. of Trade Tax* [1998] 7 SCC 228 (para 24), *Metagraphs (P.) Ltd.* v. *CCE* 1997 taxmann.com 209 (SC) (para 24), *Purewal Associate Ltd.* v. *CCE* [1996] 10 SCC 752 (para 24), *Indian Cable Co. Ltd.* v. *CCE* 1994 taxmann.com 250 (SC) (para 24), *Novapan India Ltd.* v. *CCE* 1994 (Suppl.) 3 SCC 606 (para 24), *Collector of C. Ex* v. *Ballarpur Industries Ltd.* 1989 taxmann.com 614 (SC) (para 24), *CCE* v. *Krishna Carbon Paper Co.* 1989 taxmann.com 620 (SC) (para 24), *Filterco* v. *CST* 1986 taxmann.com 534 (SC) (para 24), *Chiranjeet Lal Upendra* v. *State of Assam* 1985 (Suppl.) SCC 392 (para 24), *Indo International Industries* v. *CST* 1981 taxmann.com 385 (SC) (para 24), *Union of India* v. *Gujrat Woolen Felt Mills* 1977 taxmann.com 54 (SC) (para 24), *State of U.P.* v. *Indian Hume Pipe Co. Ltd.* [1977] 2 SCC 724 (para 24), *Dunlop India Ltd.* v. *Union of India* [1976] 2 SCC 241 (para 24), *Ganesh Trading Co.* v. *State of Haryana* [1974] 3 SCC 620 (para 24) and *CST* v. *Jaswant Singh Charan Singh* AIR 1967 SC 1454 (para 24).

Krishna Agrawal and **M.P. Devnath** *for the Applicant.*

JUDGMENT

1. Heard Sri Laksmi Narsimhan holding brief of Sri Atul Gupta, and Sri Nishant Mishra, learned counsels for the revisionist and Sri B.K. Pandey, learned standing counsel for the respondent in this bunch of revisions.

2. With the consent of learned counsels for the parties, Sales/Trade Revision No.527 of 2015 has been treated as leading revision. The revisions have been heard on following questions of law:

"A- Whether the Commercial Tax Tribunal was legally justified in passing the impugned order classifying the product "Rooh Afza" under the residuary entry (Entry 1 of Schedule V) and not under the Entry 103 of Part A of Schedule II of the U.P. VAT Act?

B. Whether the Tribunal was legally justified to give the finding based on common parlance test that the product "Rooh Afza" is known as 'sharbat'?

C. Whether the Tribunal was legally justified in classifying the impugned product

under the residuary list without considering the 'essential character' test which is a cardinal principle in classification of goods under taxation law?"

3. These bunch of revisions were heard at length on 19.4.2018, 23.4.2018 and 2.5.2018.

4. Sri Laksmi Narsimhan, learned counsel for the revisionist submits as under:

(*i*) In the case of revisionist's itself i.e. *Hamdard (Wakf) Laboratories* v. *Collector of Central Excise, Meerut,* 1999 (113) ELT 20 (SC) (Paras 3 to 8), Hon'ble Supreme Court held that product "Rooh Afza" is classifiable under Heading 2201.90 of the Central Excise Tariff Act, 1985 being a non-alcoholic beverage containing fruit juice. Thus Hon'ble Supreme Court held that "Rooh Afza" is a beverage containing fruit juice and therefore, it is fruit drink.

(*ii*) The licence under the Food Safety and Standards Act, 2006 (hereinafter referred to as 'Act 2006') and the Fruit Products Order, 1955, various orders issued by the Food Safety Authorities under the aforesaid Act, 2006 and the opinion of experts were the relevant materials for determination of the classification of "Rooh Afza", but these were not properly considered by the statutory authorities under the U.P. VAT Act, 2008 (hereinafter referred to as the 'Act 2008') in complete ignorance of the law laid down by Hon'ble Supreme Court in *Parle Agrao (P.) Ltd.* v. *Commissioner, Commercial Taxes Trivandrum and other connected* Civil Appeals, (2017) 7 SCC 540, (Paras-18, 51 to 55).

(*iii*) In revisionist's own case, i.e. *Hamdard Dawakhana (Wakf)* v. *Union of India,* AIR 1965 SC 1167 (para-15), Hon'ble Supreme court held the product "Rooh Afza" to be a fruit product while considering a controversy under the Fruit Products Order, 1955, therefore, "Rooh Afza" is classifiable as fruit drink under the aforesaid Entry No.103 of Schedule II Part-A under the U.P. Act, 2008.

(*iv*) Neither before the Assessing Authority nor before the first Appellate Authority nor before the Tribunal, the department has placed any material to establish that "Rooh Afza" is not fruit drink but an unclassified item. Therefore, the impugned order of the Tribunal being not based on any evidence, is liable to be set aside.

(*v*) Burden is on the Revenue to prove the classification which it alleged but this burden has not been discharged by the Revenue. Judgments in *Hindustan Ferodo Ltd.* v. *Collector of Central Excise* 1996 taxmann.com 174 (SC) (Paras-3 to 6) is relied.

(*vi*) When there is a specific entry being Entry No.103 of Schedule-II, Part-A under the U.P. Act 2008 which covers product in question, i.e. "Rooh Afza", the residuary entry could not have been made to invoked. It is settled law that if the product is not covered by any specific entry only then the residuary entry may be invoked. Reliance is placed on the judgment in the case of *Bharat Forge & Press Industries (P.) Ltd.* v. *CCE* 1990 taxmann.com 124 (SC) (Para-3).

(*vii*) The words "fruit drink" has been used in a technical sense. Therefore, in its technical meaning it shall cover the product "Rooh Afza" which is technically a fruit drink.

(*viii*) Referring to licence issued by the Food Safety and Standards Authority of India, Office of A.D.G. (PFA) and the determination of the product in question, i.e. "Rooh Afza" by the Food Safety and Standards Authority of India, vide letter dated 31st July, 2009, as "non-fruit syrup", he submits that it would mean that "Rooh Afza" is a fruit drink since it is non-fruit syrup.

(*ix*) Alternatively, even if it is assumed that "Rooh Afza" is not a fruit drink, it will still be a "processed fruit" since Entry-103 covers processed fruit and preserved fruit. Therefore, the product "Rooh Afza" is liable to tax at the rate of 4% classifiable under the aforesaid Entry-103.

(*x*) In reply to a question put by the court as to whether the point No.(x) above was argued before the Tribunal or the other statutory authorities, learned counsel for the revisionist submits that in Ground-2 of Sales/Trade Tax Revision No.527 of 2015, the ground was taken before the Tribunal and therefore, it is presumed that it was argued before the Tribunal.

(*xi*) Even if the alternative submissions as made above, was not raised before the Tribunal, yet it being a pure question of law, can be raised at any stage of the proceedings even it there was no adjudication on the question by the fact finding authorities. The High Court in exercise of its revisional jurisdiction can adjudicate this issue for the first time.

(*xii*) Similar entry came for consideration before the Gauhati High Court in *Pepsico India Holdings (P.) Ltd.* v. *State of Assam* [O.T. Application No. 1 of 2007, dated 28-4-2009] (Gau.) (at Paged 49-50) in which Gauhati High Court has held that the product is covered by the entry "processed or preserved vegetables and fruits including fruit jam, jelly, pickle, fruit squash, paste, fruit drink and fruit juice" and shall not fall under residuary clause.

(*xiii*) Judgment of this court in the case of the revisionist itself, i.e. *Hamdard (Wakf) Laboratories, Ghaziabad* v. *Commissioner of Sales Tax U.P. Lucknow,* 2005 NTN (Vol.27)-35 (All) (Paras-3 to 7), was made basis by the department to dispute was the classification under Entry 103 whereas in that case it was held that the product 'Rooh Afza' is syrup being concentrate of sugar and its main use is as a table drink. Therefore, the product "Rooh Afza" is a fruit drink.

5. Sri Nishant Mishra, learned counsel for the revisionist in certain connected revisions, has adopted the arguments advanced by Sri Laksmi Narsimhan.

6. Sri B.K. Pandey, learned standing counsel for the Respondent-Department submits as under:

(*i*) The controversy as to the classification of the "Rooh Afza" has been settled by this Court in *Hamdard (Wakf) Laboratories, Ghaziabad* (*supra*) wherein this Hon'ble Court held that "Rooh Afza" is concentrate of sugar and hence it is a syrup. Since syrup does not fall under any of the entries specified in the Schedule II and as such it is unclassified item under Schedule V.

(*ii*) The Full Bench of the Tribunal in its order dated 9.3.2011 in "Rooh Afza", applied the common parlance test and held the product "Rooh Afza" to be "Sharbat" and hence an unclassified item.

(*iii*) The judgment relied by learned counsel for the revisionist in *Hamdard Dawakhana (Wakf)* (*supra*) (para 10) is with respect to Fruit Control Order,

1955, which deals with the regulation of production and supply etc. of certain essential commodities. The question of taxability of the product in question was not the issue in the aforesaid case. Therefore, the said judgment is not relevant for the purposes of present case.

(*iv*) For interpretation of commodities the well recognised principle is the common parlance test i.e. how the goods are understood by those who trade in it and also by consumers who purchase it for consumption.

(*v*) The other judgments relied by learned counsel for the revisionist are wholly distinguishable on facts. The judgment in the case of *Parle Agrao (P.) Ltd.* (*supra*) has been passed without considering the larger bench judgment of Hon'ble Supreme Court in the case of *Indo Internatinal Industries* v. *Commissioner of Sales Tax* 1981 UPTC 481 (SC) (Para 4) and *Ramavtar Budhaiprasad* v. *Assistant Sales Tax Offier Akola* AIR 1961 SC 1325 (para 2) and *CCE* v. *Shree Baidyanath Ayurved Bhawan Ltd.* 2010 NTN (Vol 42) 63 (Paras 29, 35, 36, 38, 40, 41 and 43). Hon'ble Supreme Court settled the law that a commodity can not be interpreted in a technical sense. If the words are not defined, the technical meaning can not be assigned to it. For interpretation of commodities under the Sales Tax Laws, the commodity has to be interpreted applying the common parlance test. The judgment in *R.K. Trading* v. *Commercial Trade Tax Appellate Tribunal* 2015 NTN (Vol 27) 3 and *CST* v. *Melrose Biscuit Co. Aligarh* 2004 UPTC 1001 S.C. are relied. Therefore, the technical meaning as held in *Parle Agrao (P.) Ltd.* (*supra*) can not be given in view of the law laid down in larger Bench decisions of Hon'ble Supreme Court in the case of *Indo International Industries* (*supra*), *Ramavtar Budhaiprasad* (*supra*) and *Shree Baidyanath Ayurved Bhawan Ltd.* (*supra*).

(*vi*) A question which has not been raised before the Tribunal can not be entertained by the High Court in revisional jurisdiction under Section 58 of the U.P. VAT Act. Reliance is placed out the judgment in the case of *State of U.P.* v. *D.S.M. Group of Industries* and others, (2003)37 STR 171.

(*vii*) The order of the First Appellate Authority filed as Annexure 5 in connected Commercial Tax Revision No.529 of 2015 has elaborately dealt with the classification of "Rooh Afza" and recorded the findings of fact that it is an unclassified item.

(*viii*) The findings recorded by the Tribunal and other fact finding statutory authorities, are the findings of fact based on consideration of relevant materials on record and the settled principles of interpretation of commodities. Therefore, it can not be interfered with in revisional jurisdiction. The controversy is concluded by findings of fact.

Discussion and Findings:

7. I have carefully considered the submissions of learned counsels for the parties.

8. The crux of the submissions of learned counsels for the revisionists is that the product "Sharbat Rooh Afza" is not an unclassified commodity falling under residuary entry 1 of Schedule-V rather it is classifiable under Entry 103 of Part A of Schedule II of the U.P. VAT Act (hereinafter referred to as 'the Act ') being "fruit drink" or "processed fruit" liable to tax @ 4%. The Entry 103 is reproduced below:

> "Processed or preserved vegetable & fruits including fruit jams, jelly, pickle, fruit squash, paste, fruit drink & fruit juice (whether in sealed containers or otherwise)"

9. According to the respondents the product "Sharbat Rooh Afza" is covered by residuary entry liable to tax @12.5 % as provided in Schedule-V of the Act as under:

> "All goods except goods mentioned or described in Schedule-I, Schedule-II, Schedule-III and Schedule-IV of this Act."

10. Before I proceed to examine the rival contentions of the parties, it would be appropriate to narrate briefly the facts of the present cases.

11. The revisionist is manufacturer of the commodity "Sharbat Rooh Afza". During the assessment years 2007-08 and 2008-09 the revisionist manufactured and sold "Sharbat Rooh Afza" and deposited VAT @ 4% on the sales thereof alongwith monthly returns. The Assessing Authority made provisional assessment for several months holding that the product "Sharbat Rooh Afza" is an unclassified item liable to tax @12.5% falling under residuary entry of Schedule - V. The revisionist preferred First Appeals before the Appellate Authority which were dismissed. The revisionist preferred Second Appeals which were dismissed by the impugned orders passed by the Member Commercial Tax Tribunal, Bench-I, Ghaziabad. Aggrieved with the orders of the Tribunal the revisionists have filed the present revisions. Concurrent findings of fact have been recorded by the fact finding authorities that the product "Rooh Afza" is not a fruit drink but a Sharabat which is an unclassified item and, therefore, it is liable to tax @ 12.5%.

12. The product "Rooh Afza" is being manufactured by the revisionist under licence No. FPO 2782/1, granted by the licencing authority under the Provisions of the Fruit Products order, 1955. A photo stat copy of the aforesaid licence has been filed as Annexure 11 to the Revision No.617 of 2012 in which the description of products manufactured by the revisionist is mentioned as under:

> "Synthetic Sarbat, fruit syrups and squashes"

13. It appears from perusal of the aforesaid licence No.2782/1 that it was granted in the year 1972 and it continued to be renewed. During the year 2002 and thereafter, as per validation and renewal page 2 of the licence, the authorisation for manufacture of goods was specified as under:

> "Fruits syrups, squashes from purchased fruit juice/pulp, non fruit syrups/sarbat"

14. It appears that an information was sought by the Commissioner-cum-Principal Secretary, Commercial Tax Department, Bihar, from the Food Safety and Standards Authority of India as to whether "Rooh Afza" falls under heading of fruits drinks/fruit juice/fruit squash/fruit paste or not. It appears that the information, after due examination was submitted by the Assistant Director General (PFA), Food Safety and Standards Authority of India, New Delhi, vide letter dated 31.7.2009 (Annexure 11 to Revision No.617 of 2012) which is reproduced below:

"No. P. 15025/82/2009- PFA Div.

Food Safety and Standards Authority of India Office of A.D.G. (PFA)

FDA Bhawan, Kotla Road, New Delhi- 110002

Dated the 31st, July, 2009

> To,
>
> Sh. Subhakirti Majumdar
>
> Commissioner-Cum-Principal Secretary, Commercial Taxes Department, Bihar, Vikas Bhawan, Patna- 800013.

Subject:- Information whether Rooh-Afza comes under heading of fruits drinks/fruit juice/fruit squash/fruit paste or not-reg.

Sir,

Please refer to your letter no.cc(s) 101/2008-09/454(Reg.) dated 15.05.09 regarding the subject mentioned above. According to Part-II of second schedule of FPO, 1995 the product fruit syrup is defined as the product which contain 65% soluble solids ad minimum fruit Juice content in the product is 25%. But it is observed from daily production records of M/s Humdard (Wakf) Laboratories, B-1, B-2, Industrial Area, Meerut Road, Ghaziabad, UP, manufacturing Sharbat Rooh Afza and marketing in the same brand name contains 10%. Hence, Sharbat Rooh Afza may be treated as Non Fruit Syrup containing 10% Fruit Juice (Volume by Volume.) This issued in consultation with Director (Fruits and Vegetable Products.)

Yours Faithfully.

(Dr. Dhir Singh)

Assistant Director General (PFA)"

15. As per lable being wrapped on the bottles of "Sharbat Rooh Afza" and filed as Annexure 10 to the revision No.617 of 2012, the product "Rooh Afza" has been represented to customers as "Sharbat Rooh Afza" "a non alcoholic sweetened beverage".

16. After considering the facts and evidences on record the Tribunal, in its impugned order in Revision No.617 of 2012, dated 27.3.2012 passed in Second Appeal No.355/10 (April 2008) and other 8 connected Second Appeals, concluded as under:

image

image

17. In another Revision No.527 of 2015 being part of the present Bunch cases arising from another order of the Commercial Tax Tribunal (Bench-I), Ghaziabad, dated 14.08.2015, the product " Sharbat Rooh Afza" has been held to be not a fruit juice or drink, as under:

"10. After having carefully gone through the findings recorded by the additional commissioner in appeal and also the findings recorded by the assessing officer we finds ourselves in complete agreement with. The assessing officer had rightly applied the common/commercial parlance principle which is a well established principle/test to be applied for determining the true nature of any product for the purposes of assessing tax. According to this common/commercial parlance test the nature of any product or its classification is done on the basis of as to how it is perceived by its users or for what kind of use its users purchase it. There is hardly any scope of any disagreement with the view expressed by the two authorities below that in common/commercial parlance users of 'Rooh-afza' purchase it to be used only as 'Sharbat' and not as fruit juice or fruit drink; notwithstanding that it may contain some percentage of of fruit juices or non-fruit flavors. It is not consumed directly but is used only by mixing its small quantity in water. And this makes it very clear that it is used only as a 'Sharbat' and not as fruit juice or drink. The assessing officer was thus right in his approach that 'Rooh-Afza' is only a sugar concentrate having some percentage of fruit essence or flavours and not a fruit juice or drink. The additional commissioner was also right in expressing his concurrence with the findings of the assessing officer.

11. In its judgment dated 09.03.2011 in appeal no.56 of 2010 a full bench (three members bench) of the commercial tax tribunal has up-held the decision dated 10.12.2010 of the Commissioner of

Commercial Tax of U.P., Lucknow, rendered under Section 59 of the U.P. Value Added Tax Act, 2008 on the application of M/s Ashutosh Trading Company, 530, Gautam Nagar, Meerut Road, Ghaziabad. In his judgment the Commissioner had held that 'Rooh-Afza' is not fruit juice or fruit drink but is only concentrated sugar syrup and its sale is liable to be assessed at advalorem rate of tax. Following the judgment of the full bench, a division bench of commercial tax tribunal at Ghaziabad has also held, vide its judgment dated 27.03.2012 passed in appeal no.335 of 2010 to 361 of 2010 that 'Rooh-Afza' is only sugar syrup and its sale is liable to be assessed at advalorem rate of tax. The judgment of full bench and of the division bench of commercial tax tribunal at Ghaziabad is binding on this bench.

12. On the basis of discussion made here-in-above the contention of the appellant that its product 'Rooh-Afza' is a fruit drink and is covered in entry no. 103 of Schedule-II appended to the U.P. Value Added Tax Act, 2008 is here-by rejected."

18. In *Hamdard Dawakhana (Wakf)* (*supra*), relied by learned counsel for the revisionist; the question involved was the validity of certain provisions of the Fruit Control Order 1955, which was enacted for the purpose of controlling the production, supply and distribution, and Trade and Commerce in, certain commodities in the interest of general public. In *Hamdard (Wakf) Laboratories* (*supra*) relied by learned counsel for the revisionist, the controversy was whether "Sharbat Rooh Afza" falls within Tariff Heading 2202.90 or under Heading 21.07 of the Central Excise Tariff Act, 1985. Considering the Tariff entries, Hon'ble Supreme Court held that it falls within the terms of the Heading 2201.90 of the Central Excise Tariff Act, which is residuary entry of the items "beverages and Vinegar. In *Parle Agro (P.) Ltd.* (*supra*), the controversy was with respect to classification of a Product "Appy Fizz" under Section 6(1)(a) of the Kerala Value Added Tax Act, 2003. The relevant entry included non alcoholic beverages, fruit juice and aerated water etc. On the facts of that case and the relevant provisions of the Kerala VAT Act, Hon'ble Supreme Court found that the word "aerated" has been used in scientific term in entry 2 under Section 6(1)(a) of the Kerala VAT Act and, therefore, the technical meaning of the word "aerated" can be looked into for finding out of the real import of the entry. The facts of the present case are entirely different. The entries of the Kerala VAT Act are not similar to the entry No.103 Part A of Schedule 2 of the U.P. VAT Act. On the facts of that case Hon'ble Supreme Court held that the product "Appy Fizz" is classifiable under item No.5 of entry 71 of the Kerala VAT Act, as amended by S.R.O. No.119 of 2008. Thus, these judgment relied by learned counsel for revisionist are clearly distinguishable on the facts of the present case.

19. In Appeal No.56 of 2010 (*Ashutosh Trading Company* v. *Commissioner Commercial Tax, U.P. Lucknow*, decided on 9.3.2011), arising from the order of the Commissioner Commercial Tax, U.P. Lucknow, dated 10.12.2010 under Section 59 of the U.P. VAT Act, the Full Bench of the Commercial Tax Tribunal, U.P. Lucknow, considered in detail the question of classification of the Product "Sharbat Rooh Afza" and recorded a finding of fact that it is an unclassified item liable to tax @ 12.5%. The Tribunal also held that in common parlance and in commercial parlance the product in question is known as "Sharbat Rooh Afza" and on demand by customers for "Sharbat Rooh Afza" the shopkeeper shall supply only "Sharbat Rooh Afza". If a customer demands for "fruit drink" no shopkeeper shall give him "Sharbat Rooh Afza". In *M/s. Hamdard (Wakf) Laboratories* (*supra*) (Allahabad High Court), this Court considered the question as to whether "Sharbat Rooh Afza" is liable to tax as Syrup @ 12% under Notification No.7421, dated 26.10.1981, issued under the U.P. Trade Tax Act, which specifically provided Tax @ 12% on the point of sale turn over of "Soda Water, Lamonada and other soft beverages and Syrups, Squashes, Jams and Jellies". Considering the entries, this Court held, as under:

"It is not disputed that Rooh Afza is a concentrate of invert Sugar base mixed with various items namely Juices, Vegetable, flavours etc. It is said to be a Summer drink and useful also in treating disorders associated with heat. It can be used in ice cream, puddings and then like but its main use

is as a table drink for which water is mixed.

Sharbat Rooh Afza being concentrate of Sugar is a "Syrup" and falls under the Notification No.7421 dated 26.10.81 and has been rightly taxed @12%."

20. Before I proceed to record my conclusions on the facts and relevant entries under the U.P. VAT Act as discussed above, it would be appropriate to refer to certain judgments of Hon'ble Supreme Court with respect to the tests to be applied for interpretation of commodities in tax matters.

21. In the case of *Mamta Surgical Cotton Industries Rajasthan* v. *Assistant Commissioner (Anti Evasion)* [2014] 43 taxmann.com 237/44 GST 397 (paragraph Nos. 32 to 34), Hon'ble Supreme Court held as under:-

"32.The aforesaid view is further fortified by the common parlance test. It can be said that when a consumer requires surgical cotton, he would not be satisfied with cotton being provided to him and the same principle would reversibly apply that a customer of cotton would not use surgical cotton as a substitute. Further the purpose for which cotton and surgical cotton are used are diametrically opposite. While surgical cotton finds utility primarily for medical purposes in households, dispensaries, hospitals, etc. raw cotton being, inter alia, non-sterilised and riddled with organic impurities cannot be used as such at all.

33. For both these commodities operational territories are different and both have a different consumer segment. For medical and pharmaceutical purposes, use of ordinary cotton is not permissible. The fixed medical standards for the quality of surgical cotton are definite and definable such that ordinary cotton would not suffice the purpose. Surgical cotton is only used in form of medicine or pharmaceutical produce, thus it cannot be said that use of commodity is interchangeable and in that view of the matter, surgical cotton is a different commodity. It is a commodity which is used with a completely distinct identity in itself. As what is used for medical purpose is perfectly sterilised disinfected purified cotton. If raw cotton is used for surgical purposes, it would be counterproductive. Surgical cotton is extensively used for making napkins, sanitary pads and filters, etc. The surgical cotton is exclusively consumed in medical field while ordinary cotton has so many uses. The main chemical properties desired in a surgical dressing are inertness and lack of irritation in use, which is provided by the surgical cotton only if manufactured as per the standards specified. Raw cotton is purified by a series of processes and rendered hydrophilic in character and free from other external organic impurities for use in surgical dressings. Surgical cotton is, thus, completely different from ordinary cotton.

34. The surgical cotton is made sterile and fit for surgical use and it is not put to the same use to which the unmanufactured cotton is put and vice versa. Therefore, **when unmanufactured cotton undergoes a manufacturing process, a new product saleable into the market which is having a distinct identity, comes into existence which is known in the commercial market by a different name and use. Surgical cotton po**ssesses higher utility than the cotton in its unmanufactured state." (Emphasis supplied by me)

22. In the case of *Commissioner of Central Excise, New Delhi* v. *Connaught Plaza Restaurant (P.) Ltd*. (2012) 13 SCC 639 (Paragraph Nos. 20 to 33), Hon'ble Supreme Court held, as under:

"20. Time and again, the principle of common parlance as the standard for interpreting terms in the taxing statutes, albeit subject to certain exceptions, where the statutory context runs to the contrary, has been reiterated. The application of the common parlance test is an extension of the general principle of interpretation of statutes for deciphering the mind of the law maker; "[i] it is an attempt to discover the intention of the legislature from the language used by it, keeping always in mind,

that the language is at best an imperfect instrument for the expression of actual human thoughts." [(See :*Oswal Agro Mills Ltd.* v. *CCE,* 1993 Supp(3) SCC 16." (Emphasis supplied by me)

21. A classic example on the concept of common parlance is the decision of the Exchequer Court of Canada in R. v. Planter Nut and Chocolate Co. Ltd. The question involved in the said decision was whether salted peanuts and cashew nuts could be considered to be "fruit" or "vegetable" within the meaning of the Excise Tax Act. Cameron J., delivering the judgment, posed the question as follows: "...would a householder when asked to bring home fruit or vegetables for the evening meal bring home salted peanuts, cashew or nuts of any sort? The answer is obviously 'no'."

Applying the test, the Court held that the words "fruit" and "vegetable" are not defined in the Act or any of the Acts in pari materia. They are ordinary words in every-day use and are therefore, to be construed according to their popular sense. (Emphasis supplied by me)

22. In *Ramavatar Budhaiprasad* v. *STO* the issue before this Court was whether betel leaves could be considered as "vegetables" in the Schedule of the C.P. & Berar Sales Tax Act, 1947 for availing the benefit of exemption. While construing the import of the word "vegetables" and holding that betel leaves could not be held to be "vegetables", the Court observed thus :

"But this word must be construed not in any technical sense nor from the botanical point of view but as understood in common parlance. It has not been defined in the Act and being a word of every day use it must be construed in its popular sense meaning "that sense which people conversant with the subject matter with which the statute is dealing would attribute to it.

23. "In *CST* v. *Jaswant Singh Charan Singh,* the Court had to decide whether "charcoal" could be classified as "coal" under Entry I of Part III of Schedule II of the Madhya Pradesh General Sales Tax Act, 1958. Answering the question in the affirmative, it was observed as follows :(AIR pp.1456-57, paras 4 & 6)"

"4. Now, there can be no dispute that while coal is technically understood as a mineral product, charcoal is manufactured by human agency from products like wood and other things. But it is now well- settled that while interpreting items in statutes like the Sales Tax Acts, resort should be had not to the scientific or the technical meaning of such terms but to their popular meaning or the meaning attached to them by those dealing in them, that is to say, to their commercial sense" (Emphasis supplied by me)

6. The result emerging from these decisions is that while construing the word 'coal' in Entry I of Part III of Schedule II, the test that would be applied is what would be the meaning which persons dealing with coal and consumers purchasing it as fuel would give to that word. A sales tax statute is being one levying a tax on goods must in the absence of a technical term or a term of science or art, be presumed to have used an ordinary term as coal according to the meaning ascribed to it in common parlance. Viewed from that angle both a merchant dealing in coal and a consumer wanting to purchase it would regard coal not in its geological sense but in the sense as ordinarily understood and would include 'charcoal' in the term 'coal'. It is only when the question of the kind or variety of coal would arise that a distinction would be made between coal and charcoal; otherwise, both of them would in ordinary parlance as also in their commercial sense be spoken as coal. (Emphasis supplied by me)

24."In Dunlop India Ltd. v. Union of India, at p. 251, while holding that VP Latex was to be classified as "raw rubber" under Item 39 of the Indian Tariff Act, 1934, this Court observed:(SCC pp.252-54, paras 29 & 34)"

"29. It is well established that in interpreting the meaning of words in a taxing statute, the

acceptation of a particular word by the trade and its popular meaning should commend itself to the authority."

"34. We are, however, unable to accept the submission. It is clear that meanings given to articles in a fiscal statute must be as people in trade and commerce, conversant with the subject, generally treat and understand them in the usual course. But once an article is classified and put under a distinct entry, the basis of the classification is not open to question. Technical and scientific tests offer guidance only within limits. Once the articles are in circulation and come to be described and known in common parlance, we then see no difficulty for statutory classification under a particular entry." (Emphasis supplied by me)

25."In *Shri Bharuch Coconut Trading Co.* v. *Municipal Corpn. of the City of Ahmedabad*, this Court applied the test as "would a householder when asked to bring some fresh fruits or some vegetable for the evening meal, bring coconut too as vegetable (sic)?" The Court held that when a person goes to a commercial market to ask for coconuts,"

"5…… no one will consider brown coconut to be vegetable or fresh fruit much less a green fruit. No householder would purchase it as a fruit."

Therefore, the meaning of the word 'brown coconut', and whether it was a green fruit, had to be "understood in its ordinary commercial parlance." Accordingly it was held that brown coconut would not be considered as green fruit. (Emphasis supplied by me)

26.In *Indian Aluminium Cables Ltd.* v. *Union of India*, this Court observed the following: (SCC p. 290, para 12)

"12….. This Court has consistently taken the view that, in determining the meaning or connotation of words and expressions describing an article in a tariff schedule, one principle which is fairly well-settled is that those words and expressions should be construed in the sense in which they are understood in the trade, by the dealer and the consumer. The reason is that it is they who are concerned with it and, it is the sense in which they understand it which constitutes the definitive index of the legislative intention".

27. In *CCE* v. *Kanpur Vs. Krishna Carbon Paper Co.*, this Court has opined thus:

"12. It is a well settled principle of construction, as mentioned before, that where the word has a scientific or technical meaning and also an ordinary meaning according to common parlance, it is in the latter sense that in a taxing statute the word must be held to have been used, unless contrary intention is clearly expressed by the legislature. But there is a word of caution that has to be borne in mind in this connection, the words must be understood in popular sense, that is to say, these must be confined to the words used in a particular statute and then if in respect of that particular items, as artificial definition is given in the sense that a special meaning is attached to particular words in the statute then the ordinary sense or dictionary meaning would not be applicable but the meaning of that type of goods dealt with by that type of goods in that type of market, should be searched." (Emphasis supplied by me)

28."In Reliance Cellulose Products Ltd. v. CCE", it was observed :

"20. In other words, if the word used in a fiscal statute is understood in common parlance or in the commercial world in a particular sense, it must be taken that the Excise Act has used that word in the commonly understood sense. That sense cannot be taken away by attributing a technical meaning to the word. But if the legislature itself has adopted a technical term, then that technical term has to be understood in the technical sense. In other words, if in the fiscal statute, the article in

question falls within the ambit of a technical term used under a particular entry, then that article cannot be taken away from that entry and placed under the residuary entry on the pretext that the article, even though it comes within the ambit of the technical term used in a particular entry, has acquired some other meaning in market parlance. For example, if a type of explosive (RDX) is known in the market as Kala Sabun by a section of the people who uses these explosives, the manufacturer or importer of these explosives cannot claim that the explosives must be classified as soap and not as explosive." (Emphasis supplied by me)

29. "There is a catena of decisions that has dealt with the classification of Ayurvedic products between the categories of medicaments and cosmetics and in the process made significant pronouncements on the common parlance test."

30. In *Shree Baidyanath Ayurved Bhavan Ltd.* v. *CCE*, at page 404 this Court while applying the common parlance test held that the appellant's product "Dant Lal Manjan" could not qualify as a medicament and held as follows:

"3….. The Tribunal rightly points out that in interpreting statutes like the Excise Act the primary object of which is to raise revenue and for which purpose various products are differently classified, resort should not be had to the scientific and technical meaning of the terms and expressions used but to their popular meaning, that is to say the meaning attached to them by those using the product. It is for this reason that the Tribunal came to the conclusion that scientific and technical meanings would not advance the case of the appellants if the same runs counter to how the product is understood in popular parlance."

31. "In *Naturalle Health Products (P.) Ltd.* v. *CCE*, two appeals were under consideration. One was with respect to Vicks Vapo Rub and Vicks Cough Drops while the other was with respect to Sloan's Balm and Sloan's Rub. It was observed that when there is no definition of any kind in the relevant taxing statute, the articles enumerated in the tariff schedules must be construed as far as possible in their ordinary or popular sense, that is, how the common man and persons dealing with it understand it. The Court held that in both the cases the customers, the practitioners in Ayurvedic medicine, the dealers and the licensing officials treated the products in question as Ayurvedic medicines and not as Allopathic medicines, which gave an indication that they were exclusively Ayurvedic medicines or that they were used in the Ayurvedic system of medicine, though they were patented medicines. Consequently, it was held that the said products had to be classified under the Chapter dealing with medicaments. (Emphasis supplied by me)

32. *B.P.L. Pharmaceuticals Ltd.* v. *CCE*, was a case in which product "Selsun Shampoo" was under consideration for the purpose of classification under the Tariff Act. According to the manufacturers this shampoo was a medicated shampoo meant to treat dandruff which is a disease of the hair. This Court held that having regard to the preparation, label, literature, character, common and commercial parlance, the product was liable to be classified as a medicament. It was not an ordinary shampoo which could be of common use by common people. The shampoo was meant to cure a particular disease of hair and after the cure it was not meant to be used in the ordinary course.

33. Therefore, what flows from a reading of the afore-mentioned decisions is that in the absence of a statutory definition in precise terms; words, entries and items in taxing statutes must be construed in terms of their commercial or trade understanding, or according to their popular meaning. In other words they have to be constructed in the sense that the people conversant with the subject-matter of the statute, would attribute to it. Resort to rigid interpretation in terms of scientific and technical meanings should be avoided in such circumstances. This, however, is by no means an absolute rule. When the legislature has expressed a contrary intention, such as by providing a statutory definition of the particular entry, word or item in specific, scientific or technical terms, then, interpretation

ought to be in accordance with the scientific and technical meaning and not according to common parlance understanding."

23. In the case of *Commissioner of Central Excise* v. *Wockhardt Life Sciences Limited,* 2012(5) SCC 585 (Paragraph Nos.33,34,35,36,37, 38 and 39), Hon'ble Supreme Court held as under:-

"33. There is no fixed test for classification of a taxable commodity. This is probably the reason why the 'common parlance test' or the 'commercial usage test' are the most common [see *A. Nagaraju Bors.* v. *State of A.P.*, 1994 Supp (3) SCC 122]. Whether a particular article will fall within a particular Tariff heading or not has to be decided on the basis of the tangible material or evidence to determine how such an article is understood in 'common parlance' or in 'commercial world' or in 'trade circle' or in its popular sense meaning. It is they who are concerned with it and it is the sense in which they understand it that constitutes the definitive index of the legislative intention, when the statute was enacted [see *Delhi Cloth and General Mills Co. Ltd.* v. *State of Rajasthan*,"

34. One of the essential factors for determining whether a product falls within Chapter 30 or not is whether the product is understood as a pharmaceutical product in common parlance [see *CCE* v. *Shree Baidyanath Ayurved*, (2009) 12 SCC 413; *Commissioner of Central Excise, Delhi* v. *Ishaan Research Lab (P.) Ltd.* (2008) 13 SCC 349]. Further, the quantity of medicament used in a particular product will also not be a relevant factor for, normally, the extent of use of medicinal ingredients is very low because a larger use may be harmful for the human body. [*Puma Ayurvedic Herbal (P.) Ltd.* v. *CEE, Nagpur* (2006) 3 SCC 266; *State of Goa* v. *Colfoax Laboratories* (2004) 9 SCC 83 ; *B.P.L Pharmaceuticals* v. *CCE*, 1995 Supp (3) SCC1] :

35. However, there cannot be a static parameter for the correct classification of a commodity. This Court in the case of *Indian Aluminium Cables Ltd.* v. *Union of India*, (1985) 3 SCC 284, has culled out this principle in the following words:

"13. To sum up the true position, the process of manufacture of a product and the end use to which it is put, cannot necessarily be determinative of the classification of that product under a fiscal schedule like the Central Excise Tariff. What is more important is whether the broad description of the article fits in with the expression used in the Tariff..." (Emphasis supplied by me)

36. Moreover, the functional utility and predominant or primary usage of the commodity which is being classified must be taken into account, apart from the understanding in common parlance [see *O.K. Play (India) Ltd.* v. *CCE*, (2005) 2 SCC 460; *Alpine Industries* v. *CEE, New Delhi* (1995) Supp. (3) SCC 1; *Sujanil Chemo Industries* v. *CEE & Customs* (2005) 4 SCC 189; *ICPA Health Products (P.) Ltd.* (*supra*) v. *CEE* (2004) 4 SCC 481; *Puma Ayurvedic Herbal* (*Supra*); *Ishaan Research Lab (P.) Ltd.* (*Supra*) ; *CCE* v. *Uni Products India Ltd.*, (2009) 9 SCC 295]. (Emphasis supplied by me)

37. A commodity cannot be classified in a residuary entry, in the presence of a specific entry, even if such specific entry requires the product to be understood in the technical sense [see *Akbar Badrudin* v. *Collector of Customs*, (1990) 2 SCC 203; *Commissioner of Customs* v. *G.C. Jain*, (2011) 12 SCC 713]. A residuary entry can be taken refuge of only in the absence of a specific entry; that is to say, the latter will always prevail over the former [see *CCE* v. *Jayant Oil Mills*, (1989) 3 SCC 343; *HPL Chemicals* v. *CCE*, (2006) 5 SCC 208; *Western India Plywoods* v. *Collector of Customs*, (2005) 12 SCC 731; *CCE* v. *Carrier Aircon*, (2006) 5 SCC 596]. (Emphasis supplied by me)

38. In *CCE* v. *Carrier Aircon*, (2006) 5 SCC 596, this Court held:

"14... There are a number of factors which have to be taken into consideration for determining the classification of a product. For the purposes of classification, the relevant factors inter alia are statutory fiscal entry, the basic character, function and use of the goods. When a commodity falls within a tariff entry by virtue of the purpose for which it is put to (sic. produced), the end use to which the product is put to, cannot determine the classification of that product."

39. In our view, as we have already stated, the combined factor that requires to be taken note of for the purpose of the classification of the goods are the composition, the product literature, the label, the character of the product and the user to which the product is put. However, the miniscule quantity of the prophylactic ingredient is not a relevant factor. In the instant case, it is not in dispute that this is used by the surgeons for the purpose of cleaning or degerming their hands and scrubbing the surface of the skin of the patient before that portion is operated upon. The purpose is to prevent the infection or disease. Therefore, the product in question can be safely classified as a "medicament" which would fall under chapter sub-heading 3003 which is a specific entry and not under chapter sub-heading 3402.90 which is a residuary entry." (Emphasis supplied by me)

24. In the case of *Commissioner of Trade Tax, U.P.* v. *Cartos International and others* 2011 (6) SCC 705, Hon'ble Supreme Court held that classification of commodity cannot be made on its scientific and technical meaning. It is only common parlance meaning of the term which should be taken into consideration for the purpose of determining the tax liability. Application of common parlance test for interpretation of a commodity in Taxing Statute has always been recognized by Hon'ble Supreme Court as aforenoted. Reference in this regard may also be had to the judgments of Hon'ble Supreme Court in the case of *CCE* v. *Baidyanath Ayurved Bhawan Ltd.* [2009] 12 SCC 419, *B.O.C. India Ltd.* v. *State of Jharkhand* [2009] 15 SCC 590 (Pararaph-24), *Godrej Industries Ltd.* v. *CCE* [2008] 8 SCC 600, *Ponds India Ltd.* v. *Commissioner of Trade Tax* 2009 taxmann.com 934 (SC), *U.P. State Agro Industrial Corpn. Ltd.* v. *Kisan Upbhokta Parishad* [2007] 13 SCC 246, *Trutuf Safety Coal Industries* v. *CST* 2007 8 SCC 242 (paragraph 13), *Craft Interiors (P.) Ltd.* v. *CCE* 2006 taxmann.com 1210 (SC) (paragraph 18 and 20), *Parle Biscuits (P.) Ltd.* v. *State of Bihar* [2005] 9 SCC 669, *Associated Cement Co. Ltd.* v. *State of M.P.* [2004] 9 SCC 72, *Alpine Industries* v. *CCE* 2003 taxmann.com 2075 (SC), *S. Samuel MD, Harrisons Malyalam* v. *Union of India* [2004] 1 256 (Paragraph 13), *Union Of India* v. *Harjeet Singh Sandhu* [2001] 5 SCC 593, *Collector of Custom & Central Excise* v. *Surendra Cotton Oil Mill Company* 2001 (1) SCC 578, *Pappu Sweets and Biscuits* v. *Commissioner of Trade Tax* 1998 (7) SCC 228, *Metagraphs (P.) Ltd.* v. *CCE* 1996 taxmann.com 209 (SC), *Purewal Associate Ltd.* v. *CCE* 1996 (10) SCC 752, *Indian Cable Co. Ltd.* v. *Collector of CE* 1994 taxmann.com 250 (SC), *Novapan India Ltd.* v. *CCE* 1994 (Suppl.) (3) SCC 606, *Collector of Collector of CE* v. *Ballarpur Industries Ltd.*, 1989 taxmann.com 614 (SC), *CCE* v. *Krishna Carbon Paper Co.* 1988 taxmann.com 620 (SC), *Filterco* v. *CST* 1986 taxmann.com 534 (SC), *Chiranjeet Lal Upendra* v. *State of Assam* 1985 (Suppl.) SCC 392, *Indo International Industries* v. *CST* 1981 taxmann.com 385 (SC) (Paragraphs 4 and 5), *Union of India* v. *Gujrat Woollen Felt Mills* 1977 taxmann.com 54 (SC), *State of U.P.* v. *Indian Hume Pipe Co. Ltd.* [1977] 2 SCC 724, *Dunlop India Ltd.* v. *Union of India* [1976] 2 SCC 241, *Ganesh Trading Co.* v. *State of Haryana* [1974] 3 SCC 620 and in *CST* v. *Jaswant Singh Charan Singh* AIR 1967 SC 1454 and *Ramavtar Budhaiprasad* (*supra*).

25. Thus the application of common parlance test is an extension of general principles of interpretation of Statute for deciphering the mind of the law-maker. In the absence of a statutory definition in precise term; words, entries and items in physical Statute must be construed in terms of their commercial or trade understanding or according to their popular meaning. In other words they have to be constructed in the sense that the people conversant with the subject matter of the Statute would attribute to it. Resort to rigid interpretation in terms of artificial and technical meaning should be avoided in such circumstances. However, this rule shall not be applicable when the legislature has expressed a contrary intention, such

as by providing a statutory definition of the particular entry, word or item in specific, scientific or technical terms, then interpretation ought to be in accordance with scientific and technical meaning and not according to common parlance understanding. A sales Tax statute being one levying tax on sales of goods must, in absence of technical term or a terms of science or art, shall be presumed to have been used in ordinary sense or common parlance. Technical and scientific tests offer guidance only within limits where a word has a scientific and technical meaning and also an ordinary meaning according to common parlance, it is the latter sense that in a taxing statute the word must be held to have been used, unless contrary intention is clearly expressed by the legislature. If in respect of a particular item an artificial meaning is attached to particular words in the taxing statute then the ordinary sense or dictionary meaning would not be applicable but meaning of that type of goods dealt with in that type of market should be searched. The process of manufacture of a product and the end use to which it is put, cannot necessarily be determinative of the classification of that product under a fiscal statute. What is more important is whether the broad description of the article fits in with the expression used in the Tariff.... Moreover, the functional utility and predominant or primary usage of the commodity which is being classified must be taken into account, apart from the understanding in common parlance. A residuary entry can be taken refuge of only in the absence of a specific entry. The word "Fruit drink" and "Fruit Juice" used in entry 103 of Part A of the IInd Schedule to the U.P. VAT Act has neither been defined under the Act nor it has been used in technical sense. If a person asks for fruit Juice or fruit drink, he will not be given "Sharbat Rooh Afza" and vice-versa. Therefore, the Tribunal has neither committed any error of law to apply common parlance test nor committed any error to record the findings of fact that "Sharbat Rooh Afza" is not a fruit drink.

26. The submissions of learned counsels for the revisionist relying upon the licence under the Food Products Order, 1955, or under the Food Safety and standards Act, 2006, or the letter of the Assistant Director General (P.F.A.), dated 31.7.2009, as discussed above do not support the case of the revisionist. There were sufficient material on record including own documents/papers of the revisionist which enabled the fact finding authorities to hold that "Sharbat Rooh Afza" is not "fruit drink" but an unclassified item. The submission of learned counsel for the revisionist that since the Food Safety and Standards Authority of India has observed that the "Sharbat Rooh Afza" is a "Non Fruit Syrup", therefore, it is a fruit drink; is wholly without substance and baseless inasmuch as in its letter dated 31.7.2009, the Assistant Director General (PFA) Food Safety and Standards Authority of India, New Delhi, has observed that for a product to be "Fruit Syrups" it must contain minimum 25% "Fruit Juice" which is not contained in the product "Sharbat Rooh Afza" and, therefore, it is a "Non Fruit Syrup". Even in the licence for manufacture of the product in question, the revisionist has been authorised to manufacture "Non Fruit Syrup/Sharbat". The product has been represented to buyers as "Sharbat" which is evident from the label being wrapped on the bottles of "Sharbat Rooh Afza". The alternative submission that "Sharbat Rooh Afza" is a "Processed Fruit" is also totally baseless and without substance. Even as per licence to manufacture "Sharbat Rooh Afza" it is "Non Fruit Syrup/Sharabt". Therefore, there does not arise any question for the "Sharbat Rooh Afza" to be a "Processed Fruit". That apart no material has been brought on record by the revisionist either before the fact finding authorities or before this Court to indicate that "Sharbat Rooh Afza" is a "Processed Fruit".

27. As per own licence of the revisionist granted under the Fruit Products Order, 1955,, "the product in question is "non Fruit Syrup/Sharbat". As per letter of the Assistant Director General (P.F.A.), Food Safety and Standards Authority of India, New Delhi, dated 31.7.2009, the product "Fruit Syrup" has been defined in Part - II of Second Schedule of FPO 1955, as the product which contains 65% soluble solids and minimum 25% fruit juice content in the product but from daily production record of the revisionist manufacturing "Sharbat Rooh Afza" and marketing it in the same brand name contains 10% fruit juice (volume by volume) which is classified as per Part IV of the second Schedule of FPO 1955 as "Non Fruit Syrup" which is also indicated from the declaration on the label of this product. As per copy

of the licence No.10013051000525, dated 22.1.2013, issued by the designated Officer, Food Safety and Standards Authority of India, Ministry of Health and Family Welfare, Government of India, filed as Annexure 9 to the Revision No. 527 of 2015, the revisionist has been authorised to manufacture two products, *firstly*, Synthetic Sharbat and, *Secondly*, Fruit Syrups and Squashes. As per letter of the Food Safety and Standards Authority of India, dated 31.7.2009 (aforequoted) the product "Rooh Afza" is a "Non Fruit Syrup".

28. A concurrent findings of fact have been recorded by the fact finding authorities including the Tribunal that "Sharbat Rooh Afza" is not a Fruit Drink but an unclassified item. A Full Bench of the Tribunal in the case of *Ashutosh Trading Co.* (*supra*) has considered in detail the product in question and held it to be an unclassified item under the U.P. VAT Act. In *Hamdard (Wakf) Laboratories, Ghaziabad* (*supra*), this Court, while considering Notification No.7421, dated 26.10.1981 under the U.P. Trade Tax Act 1948, held that undisputedly "Sharbat Rooh Afza" is a concentrate of invert Sugar base mixed with various items and thus it being a concentrate of Sugar, is a "Syrup" falling under Notification No.7421 dated 26.10.81. Learned counsel for the revisionist could not point out any perversity in the findings of fact recorded by the fact finding authorities instead he took an alternative stand that "Sharbat Rooh Afza" is a "processed fruit" which was not even argued by him before the Tribunal. The arguments advanced in this regard are wholly without substance as discussed in para 26 and above.

29. Thus, from the facts and evidences on record as briefly noted above as well as the concurrent findings of fact recorded by the fact finding authorities it is evident that the commodity in question i.e. "Sharbat Rooh Afza" is neither a fruit drink nor a fruit juice nor a processed fruit rather it is a "Non Fruit Syrup/Sharabat" being a concentrated sugar syrup which is not specified in Schedule-I, II, III & IV of the Act. Therefore, it is an unclassified item falling under the residuary entry of Schedule-V of the Act.

30. In view of the above discussion, I do not find any infirmity in the impugned orders of the Tribunal. The Tribunal has correctly held that the commodity "Sharbat "Rooh Afza" is an unclassified item falling under Schedule-V of the Act and liable to tax @ 12.5%. It is neither fruit juice nor fruit drink nor processed fruit. In common parlance it is known as Sharbat. Since the commodity "Sharbat Rooh Afza" does not fall under any Entry in Schedule I, II, III and IV, therefore, it shall fall under the residuary entry in Schedule-V of the Act. All the three questions are answered accordingly i.e. in favour of the Revenue and against the Assessee.

31. In result, all the aforenoted revisions fail and are hereby dismissed.

s.k. jain

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*In favour of revenue.