GST/CST& VAT: Samosa is considered to be cooked food and not 'namkeen', hence it would attract higher tax rate

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HIGH COURT OF UTTARAKHAND

Sarva Shri Neeraj Misthan Bhandar

v.

Commissioner,Commercial Tax, Uttarakhand*

K.M. JOSEPH, CJ.
AND SHARAD KUMAR SHARMA, J.
COMMERCIAL TAX REVISION NOS. 36-37 OF 2010
MARCH 9, 2018

Classification of goods - Section 3 of the U.P. Trade Tax Act, 1948/ Section 3 of the U.P. Value Added Tax Act, 2008 - Sweets and Namkeens - Samosa - Period 1-4-2005 to 30-9-2005 and 1-10-2005 to 31-3-2006 - Assessee was running a shop and was engaged in activity of selling sweets, namkeen, samosa, milk and curd etc. - As per assessee, 'samosa' would come under category of 'Sweets and Namkeen', therefore it had to be taxed at rate of 5 per cent, however, Assessing Officer had wrongly taxed same at rate of 8 per cent - Whether samosa is considered to be cooked food and not 'namkeen', hence it would attract higher tax rate - Held, yes - Whether thus samosa was to be taxed at rate of 8 per cent for first six months, and for next six month at 4 per cent on basis that cooked food under VAT Act attracted 4 per cent - Held, yes [Paras 28 & 29[In favour of revenue]

FACTS

- The assessee was running a shop and was engaged in the activity of selling sweets, namkeen, samosa, milk and curd etc. He filed his return of income for the relevant assessment year and declared his taxable income at Rs.50,720 on the basis of the total turnover of Rs.11.56 lakhs.
- During the course of assessment proceedings, the Assessing Officer while completing the assessment recomputed the income of the assessee and declared his total income at Rs.13.66 lakhs. The assessee raised objections against the assessment order passed by the Assessing Officer and he also raised objections regarding the tax rate of samosa. The assessee contended that samosa would come under the category of Sweets and Namkeen, therefore it had to be taxed at the rate of 5 per cent and he also submitted that in fact Samosa in respect of the adjoining shop, had been taxed at 4 per cent under the entry 'Sweets and Namkeen'. But the Assessing Officer wrongly taxed the same at the rate of 8 per cent.
- On appeal, the Commissioner (Appeals) rejected the contentions of the assessee and upheld the order of the Assessing Officer.
- On further appeal, the Tribunal also upheld the order of the Assessing Officer.
- On appeal to the High Court:

HELD

- In the matter of classification of goods in taxing statutes, the dictionary or the etymological meaning of words may not be irrelevant. More importance is given to the popular understanding of the words used. The popular understanding would mean the understanding of those persons who are in the concerned trade and the question would be as to how they understood the particular words. In regard to the word 'cooked food', it is an expression which is to be understood in the context of the statute concerned.[Para 22]
- The legislative intention is clearly to tax cooked food on the one hand and sweetmeats and namkeen as different items. Cooked food is taxed at a higher rate under the statute in question, as compared to sweetmeats and namkeen. There cannot be any generalization and the Court would necessarily have to find assistance of the statute, in question.[Para 23]
- It is also true that the concept of cooked food need not mean that every form of cooked food within the four walls of the expression cooked food. Expression 'cooked food' must take its context from the other entries as well. This is subject of course to an inclusive definition of cooked food that may be contained in a particular statute.[Para 24]
- The judgment of the Apex Court in the case where question arose whether items like fryums are to be treated as cooked food has also been examined. The reasoning of the Apex Court was that fryums are only semi-cooked and they are not consumable and they cannot be directly consumed. Such products must undergo further process of cooking, which involves use of oil and heat and only after further cooking, it becomes ready to be consumed as cooked food.[Para 25]
- It has also been noticed that in products like ice cream though there may be a process of cooking involved; in that, milk is heated and thereafter cooled to the required level, it is not understood in the market as cooked food. It may be equally true that when one goes to a hotel and asks for cooked food, he/she would ordinarily not be served with biscuits. But, since in this case, the question as to whether Samosa is to be treated as namkeen or cooked food is of concern the choice is narrowed down to whether it is to be treated as namkeen or as cooked food. On applying the test as to whether it is consumable in the sense that it would be ready to be eaten unlike the case of fryums, there can be no manner of doubt that samosas are cooked food. This is for the reasoning that when a person dealing in samosa offers it for sale to the consumers, then without any further act on the part of consumer, it is ready to be consumed and it is in a consumable condition. In that sense, there can be no doubt that it is cooked food. There can also be no doubt that samosa is a product which emerges or gets manufactured after involving a process of cooking.[Para 26]
- Contrast this with namkeen. Namkeen is found in the company of sweets in the entry concerned. Samosas are not sweets. In fact, there is no case of the petitioner that it is to be characterized as sweets. It is brought to notice that samosa is an item which is cooked and it is ready to be eaten and it is ordinarily consumed without much delay from the time when it is cooked. Ordinarily, it is meant to be so consumed. The State urges the distinction between namkeen and samosa to be that namkeens have larger longer shelf life, the products which can be consumed even over a long period of time perhaps by addition of requisite preservatives.[Para 27]

- In none of the orders, be it the order of the Assessing Officer or the First Appellate Authority or the Tribunal, there is any reference to this question. While it is true that the assessee has raised a ground that samosa is to be taxed at 5 per cent and not at 8 per cent, there is no explanation of the ground as to what would be the basis. What is more, in none of the orders which have been issued, the same has been discussed by any of the authorities. It may be true that the grounds have been taken; but if the grounds are not pressed before the authorities, the authorities may not feel obliged to deal with the contentions which are raised. There is no finding rendered in fact by any of the authorities in this regard. In fact, there is no material produced also by the assessee in support of the contention that samosa is to be treated as namkeen and not as cooked food. Under the law, the assessee could have produced material or evidence in support of the contention that samosa is namkeen. Namkeen is ordinarily understood as mixtures and daalmot. It is unlikely that if a person walks into a shop and asks for namkeen, he would be offered samosa.[Para 28]
- Samosa may not be a meal as such as was understood by the Apex Court in the case of *Annapurna Biscuit Mfg. Co* v. *CST* 1981 taxmann.com 247. In fact, the assessee emphasized that the word 'cooked food' is called in Hindi as 'pakaya hua bhojan' and in that sense, it may be correct to say that samosa may not be a meal as such. But, here it is to be viewed that samosas are more appropriately dealt with under the entry 'cooked food' rather than 'namkeen'. It is noticed that samosa is certainly cooked food and since it satisfies requirement of cooked food otherwise in a broad sense and since the other alternative is to tax it under namkeen, in the absence of any material or finding in the orders, the order of the authorities, as confirmed by the Tribunal cannot be overturned which is undoubtedly the fact-finding authority as samosas are to be taxed at the rate of 8 per cent for the first six months and, for the next six months, at the rate of 4 per cent, on the basis that cooked food under the VAT Act attracted 4 per cent.[Para 29]

CASES REFERRED TO

Munna Lal Sons & Co. (P.) Ltd. v. *Commissioner of Trade Tax*, [2002] taxmann.com 2525 (All.) (para 4), *Annapurna Biscuit Mfg. Co*. v. *CST* [1981] taxmann.com 247 (SC) (para 13), *CCT* v. *T.T.K. Health Care Ltd*. [2007] 11 SCC 796 (para 14), *Commissioner of Trade Tax* v. *Associated Distributors Ltd*. [2009] taxmann.com 967 (SC) (para 16), *Gulati & Co*. v. *CST* [2014] 14 SCC 286 (para 17), *CST* v. *Gyanmal Kesharichand*' [1984] 55 STC 140 (MP) (FB) (para 18), *CST* v. *Ram Bhandar*, [1981] taxmann.com 374 (All.) (para 19), *CST* v. *Indra Prasad Mohan Lal* [1979] taxmann.com 255 (All.) (para 20), *Pappu Sweets & Biscuits* v. *Commissioner of Trade Tax* [1999] taxmann.com 1808 (SC) (para 21), *CST* v. *Girja Shankar Awanish Kumar* [1997] UPTC 213 (SC) (para 32) and *Devi Charan Sri Mohan Dass Kadamtar*, v. *CST* [1973] taxmann.com 106 (All.) (para 33).

Surendra Kumar Posti, Adv. *for the Appellant.* **Mohit Maulekhi**, Adv. *for the Respondent.*

JUDGMENT

K.M. Joseph, C.J. - These two Revisions are filed by the same assessee. CTR No. 36 of 2010 relates to the period 01-04-2005 to 30-09-2005, whereas, CTR No. 37 of 2010 relates to the period 01-10-2005 to 31-03-2006. It be noted that the period 01-10-2005 to 31-03-2006 is the period which was covered by the VAT Act.

2. The revisionist is running a shop. In the shop, the revisionist sells sweets, namkeen, samosa, milk and

curd. For the first period of six months as aforesaid, the revisionist was assessed to tax for a sum of Rs.50,720/- on the basis that the turnover sale was Rs.11,55,900/-. In CTR No. 37/2010, the order of assessment shows that the revisionist was assessed on Rs.13,66,400/-. The first Appeal was unsuccessful and equally the Appeal preferred before the Tribunal was unsuccessful. As such, the revisionist is before us. The following substantial questions of law have been raised in the memorandum of Appeal:

> "(*a*) Whether on the facts and circumstances of the case the learned assessing authority and learned Tribunal was justified in law that the statement were made by the son of the proprietor of the firm not by the employee of the firm?
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> (*b*) Whether on the facts and circumstances of the case the learned Commercial Tax Tribunal was justified in law in not giving any finding that what will be the rate of tax of Samosa for prevailing assessment year whether it should be @ 8% or whether it should be @ 5%
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> (*c*) Whether on the facts and circumstances of the case the learned Commercial Tax Tribunal was justified in law in not appreciating the fact that two standards cannot be opted by the Commercial Tax Authority for two shops adjacent to each other?"

3. We have heard Mr. S.K. Posti, learned counsel for the revisionist and also Mr. Mohit Maulekhi, learned representative for the Department/respondent.

4. Learned counsel for the revisionist, Mr. S.K. Posti would submit that this is a case where there was a survey, which took place on 28-07-2005. The adjoining shop is a much bigger shop, almost double the size of the revisionist's shop. The Assessing Officer has proceeded to assess the revisionist at a huge amount in the matter of turnover and, therefore, taxed after finding that the revisionist has not maintained the manufacturing account. He would, first of all, submit that this is unsustainable and in this regard, he would also rely on judgment of the Hon'ble Allahabad High Court in the case of *Munna Lal Sons & Co. (P.) Ltd*. v. *Commissioner of Trade Tax*, 2002 taxmann.com 2525.

5. Next, it is the case of the learned counsel for the revisionist that the item "Samosa" has been taxed as if it is cooked food and, therefore, it has been taxed @ 8%, whereas, it should have been taxed under the entry of Sweets and Namkeen and, therefore, it has to be taxed @ 5%. According to the learned counsel for the revisionist, cooked food has got a connotation in law. It means food which one takes as a meal and when somebody orders for a meal, he would ordinarily not be satisfied with Samosa. These are all matters, which would be decided on the basis of common parlance/understanding.

6. He would also submit that in fact Samosa in respect of the adjoining shop, has been taxed @ 4% under the entry "Sweets and Namkeen".

7. Per contra, the State representative, Mr. Mohit Maulekhi would submit that Namkeen is to be treated as cooked food. He would submit that the distinguishing feature of namkeen is that it has longer shelf-life, whereas, Samosa is an item which is to be consumed immediately. As far as rejection of accounts is concerned, he would submit that there was material to reject the same.

8. As far as the first question of law, which is raised is concerned, we are of the view that we cannot treat this as a question of law as such.

9. Then, there remains the second question as to whether the rate of tax on Samosa should be 8% or 5%. It is necessary to notice the relevant entries for the first period and the matter was governed by U.P. Trade Tax Act. The following are the entries relating to two items, namely "sweets and namkeen" inter alia and "cooked food".

S.	*Description of goods*	*Point of tax*	*Rate of tax*

No.			Percent age
43 (*i*)	Sweetmeats, namkin, rewari, gazak and sugar products except any of the aforesaid goods, which are notified under any other category in any notification issued under U.P. Trade Tax Act.	Sale to Consumer	5%
43 (*ii*)	Cooked food, cakes pastries, toffees, chocolate, confectionery and biscuits excluding bread, bunns and rusk.	Sale to Consumer	8%

10. Thus, on the one hand cooked food attracted 8% tax when it is sold to the consumers and sweetmeats and namkin attracted 5% tax when sold to the consumers.

11. When it came to the VAT Act, under which the assessment for the subsequent six months' period was completed, cooked food initially attracted 4%. Subsequently, for later years item "cooked food" has been deleted. It is for this reason, we find in the assessment orders that, for the later period, Samosa has been taxed @ 4% and it is certainly not a mistake committed by the Officer. Unless samosa is not to be treated as cooked food. Under the VAT Act, no doubt, there is a specific entry 109 of Schedule 2B, under which, the entry sweetmeat, rewari, gazak and namkin continue to attract tax of 5%.

12. This question is no longer res integra and it is a matter which is the subject matter of number of decisions. We would refer few of them.

13. In the case of *Annapurna Biscuit Mfg. Co*. v. *CST* 1981 taxmann.com 247 (SC) the question arose under the U.P. Sales Tax Act as to whether biscuits would be cooked food. The Hon'ble Apex Court held as under :—

> "The assessee, the appellant herein, is a registered firm engaged in the business of manufacture and sale of biscuits intended for human consumption. The assessee is a registered dealer under the Act. During the assessment proceedings under the Act for the year 1972-73 the assessee claimed that the turn- over relating to biscuits manufactured and sold by it amounting to Rs.35,09,920.38 was liable to be taxed at two per cent which was the rate prescribed by a notification issued by the State Government for cooked food contending that 'cooked food' included 'biscuits' also. The notification relied on was one issued on October 6, 1971 under Sub-section (2) of Section 3-A of the Act in supersession of an earlier notification dated July 1, 1969. In both the notifications the tax was fixed at two per cent of the turn-over payable at all points of sale in the case of cooked food. The Assistant Commissioner (Tax Assessment) Sales Tax, Kanpur who was the assessing authority rejected the contention of the assessee that cooked food included biscuits also and imposed tax at the rate of three and a half per cent on the turn-over relating to biscuits treating the same as an unclassified commodity. An appeal filed against the order of the assessing authority before the Deputy Commissioner Sales Tax and a further appeal before the Judge (Appeal) Sales Tax, Lucknow were unsuccessful. The High Court of Allahabad also declined to interfere with the said order. This appeal by special leave is filed against the order of the High Court under Article 136 of the Constitution.
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> The only ground urged before us is that biscuits should have been treated by the authorities under the Act and by the High Court as cooked food and sales tax should have been levied on the turnover of biscuits at the rate prescribed in respect of cooked food under the notification referred to above. The argument urged on behalf of the appellant is that biscuit which was consumed by human being for nourishment is food and since it is prepared by baking which is a kind of cooking process it should be treated as cooked food. Relying on some foreign English dictionaries it is contended that cooking means preparation of food by application of heat as by boiling, baking, roasting, broiling etc. and biscuit should therefore be treated as cooked food. What is of significance in this case is that the Hindi version of the notification issued uses the expression (pakaya hua bhojan) for "cooked food" found in the notification in English language."

14. We may refer to the judgment of the Hon'ble Apex Court in the case of *CCT* v. *T.T.K. Health Care*

Ltd. [2007] 11 SCC 796. In the said case, a question arose whether fryums are to be treated as cooked food. The question arose under Section 2 (g) of the M.P. Commercial Tax Act. The Court held as under :—

> "12. In the present case we have quoted the definition of the term 'cooked food'. It is an inclusive definition. It includes sweets, batasha, mishri, shrikhand, rabari, doodhpak, tea and coffee but excludes ice-cream, kulfi, ice-candy, cakes, pastries, biscuits, chocolates, toffees, lozenges and mawa. That the item 'cooked food' is inclusive definition which indicates by illustration what the legislatures intended to mean when it has used the term 'cooked food'. Reading of the above inclusive part of the definition shows that only consumables are sought to be included in the term 'cooked food'. In the case of 'fryums' there is no dispute that the dough/base is a semi-food. There is also no doubt that in the case of 'fryums' a further cooking process was required. It is not in dispute that the 'fryums' came in plastic bags. These 'fryums' were required to be fried depending on the taste of the consumer. In the circumstances we are of the view that 'fryums' were like seviyan 'Fryums' were required to be fried in edible oil. That oil had to be heated. There was certain process required to be applied before 'fryums' become consumable. In these circumstances the item 'fryums' in the present case will not fall within the term 'cooked food' under Item 2 Part I of Schedule II to the 1994 Act. It will fall under the residuary item "all other goods not included in any part of Schedule I".
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> 13. In *Bharat Co-operative Bank (Mumbai) Ltd*. v. *Co-operative Bank Employees Union*, 2007 4 SCC 685, this Court has held that when the word 'includes' is used in the definition, as is the case under Section 2(g) of the 1994 Act, the legislature does not intend to restrict the definition; it makes the definition enumerative and not exhaustive, that is to say, the term defined will retain its ordinary meaning but its scope would be extended to bring within the term certain matters which in its ordinary meaning may or may not comprise. Applying the above test to the term 'cooked food' in Section 2(g) of the 1994 Act we find that the said term uses the word 'includes' in the definition. The said term 'cooked food' makes the definition enumerative when it includes within the said term sweets, batasha, mishri, shrikhand, doodpat, tea and coffee. When it enumerates items like sweets, mishri, batasha, dhoodpak, tea and coffee the enumerated items help us to probe into the legislative intent. The legislative intent in the present case under Section 2(g) is to include consumables. 'Fryums' in the present case at the relevant time were not directly consumable. They were under-cooked items. They were semi-cooked items. They required further process of frying and addition of preservatives to make them consumables even after the specified time. But for the preservatives the items would have become stale."

15. It is noteworthy that the word "cooked food" under the said enactment encompassed sweets, sweetmeats, mishri, batasha etc.

16. Next, we may again notice the judgment again of the Hon'ble Apex Court in the case of *Commissioner of Trade Tax* v. *Associated Distributors Ltd*. 2009 taxmann.com 967. In the said case, the question, which arose was whether Bubblegum is to be taxed as sweetmeats under the U.P. Sales Tax Act 1948. The Court proceeded to inter alia take the following view:

> "9. When we apply common parlance test and in fact ask someone to bring the sweets from the market, he will never bring bubblegum. In common parlance, even items of confectionery will not be construed as sweetmeat (mithai). In fact, bubblegum is not an item for eating. It is kept in the mouth and after chewing the same is thrown out. The bubblegum while kept in the mouth of the children is also inflated as a balloon. In fact, it is used as a "mouth freshner". It is not made only of sugar. It contains gum base, waxes, etc. along with sugar.
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> 10. According to Wikipedia, the encyclopaedia, bubblegum is a type of chewing gum specially

designed for blowing bubbles.

13. In the notification issued under the U.P. Sales Tax Act, the mithai (sweetmeat), cooked food, namkin, etc. are under one entry, but it does not mean that namkin and cooked food is sweetmeat (mithai). In the copy of Parts V & XI and VIII of the Food Analysis Book which has been submitted, there is a mention about several items like bread, rusk, foodmeat, white bread, cream role, ice cream, cone, Bombay halwa, etc. In this one of the items mentioned is bubblegum. It does not mean that bubblegum is a sweetmeat (mithai) or confectionery."

17. In another case of *Gulati & Co*. v. *CST* [2014] 14 SCC 286, the question arose as to whether food colours are to be treated as foodstuff. The Hon'ble Apex Court, after considering the case law, held inter alia as follows :—

'16. It is trite that there is no fixed test for classification of a taxable commodity and the most commonly employed is the "common parlance test". 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 its popular sense meaning. That is to say, comprehending the term in same context as those who are concerned with it and it is that the sense in which they understand it that constitutes the definitive index of the legislative intention, when the statute was enacted. (*A. Nagaraju Bros*. v. *State of A.P*.: 1994 Supp (3) SCC 122; Delhi Cloth and *General Mills Co. Ltd*. v. *State of Rajasthan*: (1996) 2 SCC 449; *CCE* v. *Wockhardt Life Sciences Ltd*.)

17. The use of "common parlance" test and its advantage over the "etymological" test has been very aptly explained by this Court in context of term "furniture" in *Craft Interiors (P.) Ltd*. v. *CCE* [2006] 12 SCC 250. This Court has observed as under:

"18. We may add that sometimes chairs, beds, tables, desks, etc. are affixed to the ground, but nevertheless they will still be called as furniture (one may recall the fixed bed in Sherlock Holme's story "The Speckled Band"). This is because when we interpret a word we should not only see the dictionary meaning but even more the popular meaning which the word has acquired in common parlance. As stated by K.L. Sarkar (in his book Mimansa Rules of Interpretation) "the popular meaning overpowers the etymological meaning.

19. To give an example, the word "pankaja" literally means born in mud. The word "panka" means "mud" and the word "ja" means "which is born in". Hence the etymological meaning of the word "pankaja" is that "which is born in mud". Many things can be born in mud e.g. insects, vegetation, water flowers, etc. However, by popular usage the word "pankaja" has acquired a particular meaning in common parlance i.e. lotus. This meaning will, therefore, prevail over the etymological meanings.

20. Similarly, the word "furniture" has a meaning in common parlance which every layman understands. It commonly refers to chairs, desks, tables, beds, etc. Hence we should give it this popular meaning.

21. In *Welcome Hotel* v. *State of A.P*. [1983] 4 SCC 575, this Court while construing the term "foodstuff', has observed that the expression foodstuffs' is made of two expressions, food' plus 'stuff'. The expression 'food' has generally been understood to mean nutritive material absorbed or taken into the body of an organism which serves for purposes of growth, work or repair and for the maintenance of the vital process. While, the stuff which is used as food would be foodstuff and therefore, foodstuff is that which is taken into the system to maintain life and growth and to supply waste of tissue.

24. In the light of the aforesaid it could be concluded that food colours and food essences have not been considered to be foodstuff or a combination of the foodstuffs by either lexicographers or in common parlance and the two by no stretch of imagination would constitute "foodstuff. Therefore, we are of the considered opinion that the claim of the Assessee that "food colours" and "food essences" are "foodstuffs" within the meaning of the notification was rightly rejected by the High Court upsetting the view expressed by the Tribunal.'

18. Now, we may notice a few decisions of the High Courts in this regard. In the case of *CST* v. *Gyanmal Kesharichand*' [1984] 55 STC 140, the question arose as to whether "ice-cream" and "ice-candy" are "cooked food" under the Madhya Pradesh General Sales Tax Act, 1958. The Full Bench of the Madya Pradesh High Court, after elaborate consideration, took the view that ice-cream and ice-candy are not cooked food. The Full Bench held as under :—

'17. It is a matter of common knowledge that "ice-cream" and "ice-candy" are items of wide consumption in the country by people of all strata in the society and neither the merchants dealing in these items nor the consumers in general sell or purchase it as "cooked food". We quote with approval the observations of the Division Bench of this Court in *Commissioner of Sales Tax* v. *Shri Ballabhdas Ishwardas* [1968] 21 STC 309:

"But in common parlance 'cooked food' means those things which one eats at regular times of the day at break-fast, dinner or supper."

"Ice-cream" or "ice-candy" may be consumed alone or as adjunct to other food but certainly no one takes them as "cooked food" at meal hours. It is true that milk is a major component of these products and the process of their preparation involves heating and freezing, but we are concerned with "popular sense" or "common parlance" understanding of the end-product and not with the mode of its preparation, particularly when we are dealing with legislation on sales tax. The learned counsel for the respective assessees had submitted that this "common parlance" meaning of "cooked food" ascribed in Ballabhdas Ishwardas's case : [1968] 21 STC 309 was in view of the entry of "cooked food" as it stood then, with the change in the form of entry and as it stood during the relevant period the observation in that decision regarding "common parlance" meaning of "cooked food" does not hold the field. The learned counsel for the assessees relied upon a Division Bench decision of this Court in *Commissioner of Sales Tax, Madhya Pradesh* v. *Regal Dairy, Mhow* [1981] 47 STC 374. The argument does not appeal to us. The change in the form of an entry would not change its ordinary or "common parlance" meaning. It is a different matter that by the artificial definition it may be made either restrictive or extensive. At this stage we would like to extract the following observations from the decision of the Supreme Court in *Commissioner of Gift-lax, Madras* v. *N. S. Getty Chettiar* AIR 1971 SC 2410 :

"14. As observed in Craics on Statute Law (6th Edn., p. 213) that an interpretation clause which extends the meaning of a word does not take away its ordinary meaning. An interpretation clause is not meant to prevent the word receiving its ordinary, popular and natural sense whenever that would be properly applicable, but to enable the word as used in the Act, when there is nothing in the context or the subject- matter to the contrary to be applied to some things to which it would not ordinarily be applicable."

The Division Bench in Regal Dairy's case [1981] 47 STC 374; [1981] 14 VKN 7 has also not held that with the changed definition the "common parlance" or "popular sense" meaning of "cooked food" has undergone a change. What the Division Bench has held is that by enacting the entry in its changed form the legislature meant to cover those articles which are made fit for eating by a heating process as boiling, roasting or baking. We do not agree with this sweeping interpretation of the entry. We have already held in the preceding paragraph relying on the Supreme Court decisions that

for interpreting items in sales tax statute the mode of preparation or the scientific or technical sense meaning has not to be applied. It is the "popular sense" or "common parlance" meaning that has to be ascribed.'

19. In the case of *CST* v. *Ram Bhandar* 1981 taxmann.com 374 (All.) the learned Single Judge had to deal with the controversy as to whether namkin was to be taxed as cooked food upto 30-11-1979 or as an unclassified item. In this regard, the learned Single Judge proceeded to lay down as under :—

"7. It would not be rather necessary to mention the legislative history of this entry. Suffice it to say that upto 13th June, 1969, the entry was "cooked food (including sweetmeats and confectionery other than that sold in sealed tinned containers." Thereafter 'cooked food' was separated and remained so during the period 1- 7-1969 to 31-5-1975 and at the relevant time its turnover was taxable at 2 per cent. The Hindi version of the expression 'cooked food' is 'Pakaya hua Bhojan'. Cooked food or for the matter of that Namkin do not find any definition in the Act. This being so, the expression 'cooked food' will have to be understood in the sense in which it is understood in common parlance, that is to say, in the sense which people conversant with this subject matter would attribute to it, vide *Ramavtar* v. *Assistant Sales Tax Officer*, [1961] 12 STC 286. As has been noted above this expression has come up for consideration before this Court in several cases and the view taken is that cooked food is food which is cooked and is taken at regular meal hours, i.e. at break fast, lunch or dinner. Before the Madhya Pradesh High Court as well a similar question had also come up for consideration in *Commissioner of Sales Tax* v. *Shri Ballabh Das Ishwar Das*, [1968] 21 STC 309. The question was "whether biscuits fall under tax free goods under item no. 41 of Schedule II to the C.P. and Berar Sales Tax Act, 1947?" This entry read as under:

"Cooked food other than

(*a*) pastries, or

(*b*) a meal, the charge for which exceeds one rupee."

The view taken was that "when one talks of 'food' or 'cooked food' what one means is that which one takes into the system to maintain life and growth to supply ailment or nourishment. In a wide sense food would, no doubt, include everything that is eatable. But in a common parlance 'cooked food' means those things which one eats at regular times of the day at breakfast, dinner or supper." About biscuit it was found that no doubt it is a kind of food and the process of baking involved in the manufacture of biscuits is, no doubt, a form of cooking. But it is not 'cooked food' which one takes at meal hours. Biscuits can be eaten alone or as adjunct to other food. But, no one would normally dream of living on biscuits only day in and day out without getting diseases flowing from malnutrition and under-nourishment. On this view it was held that the term 'cooked food' used in entry 41 aforesaid cannot be read in a wide sense so as to include everything made fit for eating by application of heat, as by boiling, baking, roasting, broiling etc. The term is confined to those cooked things which one generally takes at regular meal hours."

8. This decision, in my opinion, clearly meets the argument urged by Sri Gularti that the expression 'cooked food' is of wider import and would include cooked meals and of course cooked meals are taken at regular meal taken at regular meal hours but there are some other items also, for instance, Namkin which are also taken at regular meal hours and that being so, though Namkin may not be a cooked meal but certainly it is a cooked food. In my opinion Namkin like biscuits cannot be regarded as sufficient to maintain life and growth and to supply proper nourishment to the body. No one would normally dream of living on Namkin only day in and day out without getting diseases flowing from malnutrition and under- nourishment.

9. Reliance was placed by Sri Gulati on a latter decision of the Madhya Pradesh High Court in the

case of *Commissioner of Sales Tax* v. *India Coffee Workers Co-operative Society Ltd.*, [1970] 25 STC 43. In that case the question for consideration was as to what is the correct interpretation of the word meal occurring in sub- item (b) of Item 9 of Schedule I of the Madhya Pradesh General Sales Tax Act, 1958, and whether the sale of one or more articles of Annexure II constituted, a sale of a meal? The assessee in that case served to its customers as many as 32 food articles which were different types of coffee, Ice-cream, cutlet, eggs, Dosa and such other preparations. Item no. 9 of Schedule I aforesaid read as under:

"Cooked food other than-

(*a*) Pastries,

(*b*) a meal the charge of which exceeds rupees two,

(*c*) sweetmeats."

There was no controversy in that case that the articles sold by the assessee were cooked food and the only question was whether the sale of any of those articles singly or collectively exceeding in value rupees two constitutes 'a meal', the charge of which exceeds Rs.2/-. The expression 'a meal' is not defined in the Act and its popular sense was accepted and it was observed:

"Now when one talks of a meal what one means, is food one takes at regular times of the day, at a breakfast, dinner or supper etc. no doubt, one can satisfy the requirements of hunger and exist by eating at any time every thing that is eatable, but that is not taking 'a meal' it is making 'a meal' of the eatable or eatables."

On this view it was held that the sale of any of the articles sold by the assessee did not constitute sale of any meal. They were sales of cooked food which is exempt from tax under item no. 9 of the schedule aforesaid. The earlier decision given in Sri Ballabhdas Ishwardas case was not referred in it. There was no controversy in India Coffee Worker's case that the articles sold by the assessee were cooked food. Any way from these decisions it comes out that dinner or supper. And the purpose is to serve the physical needs of the body. It is correct that requirements of hunger can be satisfied for the time being by anything and everything which is eatable but every such thing cannot be regarded as cooked food. Like biscuits the same is true about Namkin. It is alone cannot satisfy the physical requirements of the human body. It is not an item of balanced diet sufficient to keep a person in good and proper health. In my opinion, therefore, Namkin is to be treated as an unclassified item and not as cooked food."

20. Learned counsel for the revisionist, Mr. S.K. Posti also brought our attention to the judgment of the learned Single Judge of Allahabad High Court in the case of *CST* v. *Indra Prasad Mohan Lal* 1979 taxmann.com 255. Following the judgment of the Hon'ble Apex Court [1978] 41 STC 394, the learned Single Judge proceeded to hold that Lal (puffed rice obtained by parching) and chura (made by flattening rice) are different forms of rice so as to fall under the category of foodgrain and not under the category of cooked food.

21. In *Pappu Sweets & Biscuits* v. *CST* 1999 taxmann.com 1808 (SC) the question arose as to whether toffee is sweetmeat, namkin, rewari, gazak and commodities of like nature. The question arose in the following fashion:—

There was an exemption notification granted by the Government under the U.P. Sales Tax Act, 1948, by which, tax concessions were granted to new industrial units other than those making sweetmeat, namkin, rewari, gazak and commodities of like nature. The Court proceeded to take the view that toffee cannot be treated as sweetmeat. In proceeding to hold so, the Court inter alia has referred to the dictionary meaning and thereafter proceeded to hold as follows:—

'8. It is true that the dictionary meaning of the word "sweetmeat" is very wide and any food which is sweet and rich in sugar can be described as "sweetmeat". Toffee is a confection of sugar and other materials and being rich in sugar would be "sweetmeat" in its wider sense. But for deciding whether toffee is "sweetmeat" as contemplated by the exemption notification, what is required to be considered is the object of the notification and the context in which that word is used in the notification."

11. A correct reading of the notification further discloses that the words "commodities of like nature" in Entry 18 were meant to include commodities other than those specifically mentioned. What they indicate is that other commodities of like nature also were not to get benefit of the exemption. To that extent they did widen the scope of the Entry but they cannot be construed to have the effect of enlarging the meaning of the word "sweetmeat". As that was not the purpose of including those words in the Entry, the High Court was not justified in holding that they gave an unlimited and unrestricted meaning to the word "mithai" or "sweetmeat".

12. The High Court has also not correctly applied the popular parlance test. As can be seen from the observations made by it that: "There is no doubt that a toffee is a sweetmeat, as understood by the people where toffee originated" and that "Toffee and other things of that natures are of foreign origin and are sweets or sweetmeat according to those people and their nature cannot be changed simply because their origin is different from what is usually conveyed by the word 'mithai' in this part of the country", the High Court preferred to decide the issue by relying upon how toffee is understood by the people of the country where it originated rather than by considering how "toffee" is understood in India and more particularly in the State of U.P. As held by this Court in *CCE* v. *Parle Exports (P.) Ltd*. (SCC p. 357, para 17).'

22. On a conspectus of various decisions which we have adverted to, the following principles can be deduced :—

"In the matter of classification of goods in taxing statutes, the dictionary or the etymological meaning of words may not be irrelevant. More importance is given to the popular understanding of the words used. The popular understanding would mean the understanding of those persons who are in the concerned trade and the question would be as to how they understood the particular words. In regard to the word 'cooked food', it is an expression which is to be understood in the context of the statute concerned."

23. As for instance, we have noticed the decision of the Hon'ble Apex Court under the Madhya Pradesh Act. In the said Act, cooked food included sweetmeats and other items, whereas, in the statute with which we are concerned, we are faced with the question in the context of different entries, namely, cooked food inter alia among other items and a separate entry for sweetmeats and namkeen inter alia. Therefore, the legislative intention is clearly to tax cooked food on the one hand and sweetmeats and namkeen as different items. Cooked food is taxed at a higher rate under the statute in question, as compared to sweetmeats and namkeen. There cannot be any generalization and the Court would necessarily have to find assistance of the statute, in question.

24. It is also true, as has been laid down by the Hon'ble Apex Court in the case of *Annapurna Biscuit Mfg. Co*. (*supra*), as also the judgment of the learned Single Judge in *Ram Bhandar's* case (*supra*) that the concept of cooked food need not mean that every form of cooked food within the four walls of the expression cooked food. Expression "cooked food" must take its context from the other entries as well. This is subject of course to an inclusive definition of cooked food that may be contained in a particular statute.

25. We have also noticed the judgment of the Hon'ble Apex Court in the case where question arose

whether items like fryums are to be treated as cooked food. The reasoning of the Hon'ble Apex Court was that fryums are only semi cooked and they are not consumable and they cannot be directly consumed. Such products must undergo further process of cooking, which involves use of oil and heat and only after further cooking, it becomes ready to be consumed as cooked food.

26. We have noticed also that in products like icecream though there may be a process of cooking involved; in that, milk is heated and thereafter cooled to the required level, it is not understood in the market as cooked food. It may be equally true that when one goes to a hotel and asks for cooked food, he/she would ordinarily not be served with biscuits as was the position in the case of *Annapurna Biscuit Mfg. Co*. (*supra*). But, since in this case, we are concerned with the question as to whether Samosa is to be treated as namkeen or cooked food and we are not asked to pronounce upon whether it is to be treated as unclassified items, the choice is narrowed down to whether it is to be treated as namkeen or as cooked food. If we apply the test as to whether it is consumable in the sense that it would be ready to be eaten unlike the case of fryums, there can be no manner of doubt that samosas are cooked food. This if for the reasoning that when a person dealing in samosa offers it for sale to the consumers, then without any further act on the part of consumer, it is ready to be consumed and it is in a consumable condition. In that sense, there can be no doubt that it is cooked food. There can also be no doubt that samosa is a product which emerges or gets manufactured after involving a process of cooking.

27. Contrast this with namkeen. Namkeen is found in the company of sweets in the entry concerned. Samosas are not sweets. In fact, there is no case of the petitioner that it is to be characterized as sweets. It is brought to our notice that samosa is an item which is cooked and it is ready to be eaten and it is ordinarily consumed without much delay from the time when it is cooked. Ordinarily, it is meant to be so consumed. Learned representative of the State urges before us the distinction between namkeen and samosa to be that namkeens have larger longer shelf- life, the products which can be consumed even over a long period of time perhaps by addition of requisite preservatives.

28. In this context, we are handicapped by one aspect. In none of the orders, be it the order of the Assessing Officer or the First Appellate Authority or the Tribunal, there is any reference to this question. While it is true that the assessee has raised a ground that samosa is to be taxed at 5% and not at 8%, there is no expatiation of the ground as to what would be the basis. What is more, in none of the orders which have been issued, the same has been discussed by any of the authorities. It may be true that the grounds have been taken; but if the grounds are not pressed before the authorities, the authorities may not feel obliged to deal with the contentions which are raised. There is no finding rendered in fact by any of the authorities in this regard. In fact, there is no material produced also by the assessee in support of the contention that Samosa is to be treated as namkeen and not as cooked food. Under the law, the assessee could have produced material or evidence in support of the contention that samosa is namkeen. Namkeen is ordinarily understood as mixtures and daalmot. It is unlikely that if a person walks into a shop and asks for namkeen, he would be offered samosa.

29. We must record that we are conscious of the fact that Samosa may not be a meal as such as was understood by the Hon'ble Apex Court in the case of *Annapurna Biscuit Mfg. Co*. (*supra*). In fact, the learned counsel for the revisionist emphasized that the word "cooked food" is called in Hindi as "pakaya hua bhojan" and in that sense, it may be correct to say that Samosa may not be a meal as such. But, here we are constrained to incline ourselves to take the view that Samosas are more appropriately dealt with under the entry "cooked food" rather than "namkeen". We have noticed that samosa is certainly cooked food and since it satisfies requirement of cooked food otherwise in a broad sense and since the other alternative is to tax it under namkeen which does not appeal to us, in the absence of any material or finding in the orders, we are inclined to not overturn the order of the authorities, as confirmed by the Tribunal which is undoubtedly the fact finding authority as samosas are to be taxed at the rate of 8% for the first six months and, for the next six months, at the rate of 4%, on the basis that cooked food under

the VAT Act attracted 4%.

30. Therefore, we would answer the question of law which is framed as question No.2 against the assessee and in favour of the Department.

31. As far as other questions are concerned, namely, the absence of basis to assess the revisionist in both the periods at the high amount, we are not inclined to interfere with the matter. Admittedly, there was a survey.

32. Regarding the rejection of manufacturing account, we may notice the judgment of the Hon'ble Apex Court in the case of *CST* v. *Girja Shankar Awanish Kumar* 1997 UPTC 213. Therein, the Apex Court inter alia has held as follows:—

> "The keeping of a stock register, especially in the case of a manufacturer, is of great importance. It is a means of verifying the assessee's accounts by having a quantitative tally. Section 12 (2) of the Act mandates the dealer to maintain stock-books in respect of raw materials as well as product obtained at every stage of production. If such a stock-book is not maintained, it leads to the conclusion that the account books are not reliable or that particulars are not properly verifiable. If the account books are rejected, the turnover has to be determined to the best of judgment of the assessing authority concerned. We are unable to uphold the view that a defect in non-maintenance of stock register is only technical and so the turnover disclosed in the account books should be accepted."

33. Therefore, the Apex Court did not find favour with the finding of the High Court that the defect of not maintaining of manufacturing account is of technical nature and found that it is a matter of great importance in the case of a manufacturer. No doubt, the revisionist has relied on the case of *Devi Charan Sri Mohan Dass Kadamtar* v. *CST* 1973 taxmann.com 106 (All.) The Division Bench has held as follows :—

> "The Revision Authority seems to be of the view that account books have necessarily to be rejected and turnover to be enhanced, if an assessee, who is a manufacturer, does not maintain stock book in accordance with rule 72 (2), even if his accounts are otherwise found to have been properly maintained and the turnover correctly shown in the return. This is a patently erroneous view. The Sales-tax Act is primarily concerned with the turnover. The turnover has to be ascertained from the books of accounts maintained by an assessee. The mercantile community follows various system of account keeping. The Sales-tax Act does not insist that any particular system of accounting should be followed. All that is necessary is that the accounts should be maintained in the ordinary course of business and in accordance with a recognized system of account keeping. Indeed, Rule 72 does not prescribe any system of accounting. It merely prescribe what information should be available in the account books. If the accounts maintained by an assessee are found to be kept in the ordinary course of business and are open to verification, they have to be accepted. On the other hand, if the accounts are defective and are not susceptible to verification and there are circumstances to show that the assessee has not correctly recorded his turnover, Rule 72 may be pressed into aid to reject the accounts and to make a proper estimate of the turnover. But, in the absence of a finding that the accounts are defective and the turnover has not been correctly recorded, mere non-compliance of Rule 72 will not lead to inevitable consequence of the rejection of accounts and enhancement of turnover. There is no provision in the Sales-tax Act which requires the accounts to be maintained in a prescribed manner. Indeed, Rule 72 itself does not say that if it is not complied with the accounts shall be rejected and a best judgment assessment will be made.
>
> In the instant case the Revising Authority has recorded a categorical finding that the sales under the different heads were reasonable and there was no defect in the assessee's account books and further

that the omission to maintain manufacturing account in accordance with Rule 72(2) was merely a technical defect. In such circumstances it was not open to the Revising Authority to reject the accounts and to enhance the turnover. Curiously the enhancement has been made in the turnover of utensils, which has been held by the Revising Authority to be reasonable. The enhancement in the circumstances is absolutely arbitrary and without any materials."

34. We notice, however, that the Division Bench decision dated 6th August, 1973, is much before the judgment of the Hon'ble Apex Court.

35. Secondly, we may notice, in fact, in this case the accounts were not found acceptable. We do not think that the revisionist can contest this having regard to the facts of this case and particularly having regard to the number of employees who are engaged.

36. The learned counsel for the revisionist made a complaint that the adjoining shop owner has a much bigger shop dealing with the same product and he has been assessed at a lower rate. We do not think that this will give rise to a substantial question of law as is understood in law. The fact that samosa made in the said shop has been assessed at the rate as applicable to namkeen cannot possibly colour our understanding of the entry in law.

37. When this Court is called upon to decide the matter in terms of the substantial question of law, it has to decide the question as to what the law is and not on the basis of the treatment accorded to another dealer. There can be no scope for such consideration in revision which can be maintained only on the basis of substantial question of law.

38. We see no merit in the Revisions. The Revisions are dismissed without any order as to costs.

jyoti

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*In favour of revenue.