

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT:

**THE HONOURABLE MR.JUSTICE THOTTATHIL B.RADHAKRISHNAN
&
THE HONOURABLE MR.JUSTICE K.HARILAL**

FRIDAY, THE 30TH DAY OF OCTOBER 2015/8TH KARTHIKA, 1937

OT.Rev.No. 116 of 2012

**AGAINST THE ORDER IN T.A (VAT) NO.16/2009 OF KERALA VALUE ADDED TAX
APPELLATE TRIBUNAL, ERNAKULAM, DATED 30.01.2010.**

REVISION PETITIONER(S) :

**M/S. UNITED BREWERIES LIMITED,
VARANAD, CHERTHALA, ALAPPUZHA DISTRICT,
REPRESENTED BY K.SUDHIR, GENERAL MANAGER.**

**BY SRI.ARSHAD HIDAYATHULLA, SENIOR ADVOCATE
ADVS.SRI.HARISANKAR V. MENON
SRI.MAHESH V.MENON**

RESPONDENT(S) :

**STATE OF KERALA,
REPRESENTED BY ITS SECRETARY, TAXES DEPARTMENT,
GOVT.SECRETARIAT, THIRUVANANTHAPURAM- 695 001**

BY SR.GOVERNMENT PLEADER SRI.LIJU.V.STEPHEN

**THIS OTHER TAX REVISION (VAT) HAVING BEEN FINALLY HEARD
ON 23-09-2015, ALONG WITH OTRV.NO.117 OF 2012 AND
W.P.(C).NO.30834 OF 2013, THE COURT ON 30-10-2015 PASSED
THE FOLLOWING:**

Msd.

APPENDIX

PETITIONER(S)' ANNEXURES :

- ANNEXURE A: COPY OF ORDER OF THE ASST.COMMISSIONER,
COMMERCIAL TAXES, ALAPPUZHA DATED 09.03.2007.**
- ANNEXURE B: COPY OF APPELLATE ORDER OF THE DY.COMMISSIONER
(APPEALS), KOLLAM DATED 21.10.2008.**
- ANNEXURE C: COPY OF ORDER OF THE KERALA VALUE ADDED TAX
APPELLATE TRIBUNAL ERNAKULAM IN T.A.VAT.NOS.16/09
TO 25/09 TO 362/09 TO 364/09 DATED 30.01.2010.**

RESPONDENT(S)' ANNEXURES :

NIL

//TRUE COPY//

P.S.TO JUDGE.

Msd.

“CR”

Thottathil B.Radhakrishnan

&

K.Harilal, JJ.

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OTRV.Nos.116 & 117 of 2012

and

WP(C).No.30834 of 2013

= = = = =

Dated this the 30th day of October, 2015

Judgment

Thottathil B.Radhakrishnan, J.

1.Two revisions under section 63 of the Kerala Value Added Tax Act, 2003; for short, the ‘Act’; challenging decisions on an identical issue by Appellate Tribunal under that Act; and a writ petition filed by the same dealer challenging the assessing authority’s order for a subsequent year, issued based on the view which is the subject matter of the two revisions, are being decided through this common judgment.

2.Upon hearing the learned Senior Advocate appearing for the assessee and the learned Government Pleader for the Department of

Commercial Taxes; the issue for decision in these matters is as to whether 'spent grain', generated in a brewery in the manufacture of 'beer', is an article that would fall within the Entry at Serial No.3 in the First Schedule of the Kerala Value Added Tax Act, 2003, which relates to exempted goods; or whether, it is assessable to tax, by treating them as not goods falling under clause (a) or (c) of section 6(1) of that Act?

3. On behalf of the assessee, the propositions formulated and addressed upon, are threefold. Firstly, it was argued that the burden of classification was illegally put on the assessee as it was for the Revenue to show that the product falls into the category other than the one claimed by the assessee. According to the assessee, the Revenue produced no evidence in that regard and therefore, the assessee's claim had to be accepted. The second argument was that where there was a specific entry/heading, that had to be preferred to the residuary entry/heading. Thirdly, it was argued that 'spent grain' is nothing but 'an article of cattle feed', both in trade parlance and in its use; and therefore, it has to be understood as

indicative only of the residue of the assessee's process as a brewer; which residue is nothing but 'an article of cattle feed', both in use and trade parlance. It is thus argued that the decisions of the Appellate Tribunal, challenged through the revision petitions are unsustainable in law and the Tribunal erroneously decided the relevant questions of law, which arose in the case. As regards the subsequent year, in relation to which the writ petition is filed, it is pointed out that the assessee took recourse to writ jurisdiction, since the issues of law raised by the assessee stood decided finally against its interest by the Appellate Tribunal and those decisions of the Tribunal stood impeached before this Court by the assessee through the captioned revisions.

4. Relying on the views of the statutory authorities, including that of the Appellate Tribunal, as reflected by the impugned orders, the learned Government Pleader for the Department of Commercial Taxes, argued that the commodity 'spent grain' does not find a place among the entries in the First schedule; that the dealer failed in establishing the correct entry of the product, 'spent grain', in

the First Schedule; and that, the onus of proving that 'spent grain' is not taxable, is on the dealer, and that the assessee had not discharged that burden. He also relied on the factual finding of the statutory authorities that during the process of brewing, certain residuary is obtained, and that, such residuary, which is a mixture of maize bran and of other leguminous plants, could be used as cattle feed and the assessee sells that residue to agriculturists, who use it as cattle feed. On that factual premise, it was argued that the Appellate Tribunal was justified in holding that 'spent grain' does not fall under the First Schedule, in which there is no specific entry of any such item. He, thus, supported the decisions of the Appellate Tribunal and argued that the revisions and the writ petition are liable to be dismissed.

5. Sub-section 4 of section 6 of the Act provides that goods specified in the First Schedule shall be exempted from tax. The 'Description of Goods' at Sl. No.3 (three) in the First Schedule stands with a caption, which unequivocally describes the legislative intention as to the sweep and breadth

of the strata as to the goods intended to be exempted as per that entry. That entry description reads as follows: "Aquatics feed, poultry feed, cattle feed and their supplements including husk of pulses, additives and concentrates, grass and hay, but excluding those specifically mentioned in Schedule III". Such multifarious enumeration and description of exempted goods under Sl. No.3 (three) in the First Schedule takes out from its sweep those materials which are specifically mentioned in the Third Schedule. The exclusionary component of the description of goods under Sl. No.3 (three) in the First Schedule does not rope in goods which would fall in Schedule III. As is discernible from the orders of the statutory authorities, which are impugned in the revisions and in the writ petition, there is no case for the Department that 'spent grain' is nothing but the residue of the process of brewing, which leads to the primary product called 'beer'. Even according to the departmental authorities, the claim for exemption made by the assessee was towards the sale of 'spent grain' on the premise that it is an item which is eligible for exemption as falling under the First Schedule to the Act. The assessee had

specifically taken the stand before the Assistant Commissioner itself that during the process of brewing, certain residuaries are obtained, which are used as cattle feed and that such residuary is a mixture of maize bran and of other leguminous plants. The assessee pleaded that such 'spent grain' is sold to agriculturists who use it as cattle feed. Item 3(2) of the First Schedule to the Act deals with bran, sharps and other residuaries, whether or not in the form of pellets, derived from sifting, milling or other working of cereals or of leguminous plants or pulses. (a) to (f) thereof deal with some of those items and (f) in particular deals with other leguminous plants. The assessee, therefore, contended that the product could be classified as one coming under that Entry and is therefore exempted from tax. This contention of the assessee has been rejected by merely saying that the contention raised by the assessee is not acceptable and that the dealer failed to prove in establishing the correct entry of the product under the First Schedule to the KVAT Act and that no HSN Code is stated to classify the commodity and therefore, the assessee has not discharged the onus to prove that 'spent grain' is not taxable. There

is absolutely no finding in the impugned orders of the statutory authorities, including the Appellate Tribunal that, though the residue of the process of brewing could be treated as; and utilised as; aquatic feed, poultry feed, or, cattle feed; such material - 'spent grain' - is an item specifically mentioned in Schedule III. Revenue does not even have a case asserting that 'spent grain' which is a residue of the process of production of 'beer', is an article by itself, or otherwise, among those specifically mentioned in Schedule III. When the dealer prima facie shows; quite strongly; that in all reasonableness and on the basis of predominantly identifiable indicators, a particular article of goods falls under an entry in the nature of what is provided for at Sl. No.3 (three) in the First Schedule, it would be for the Revenue to show that those goods fall within the exclusions under that entry, and would fall within the tax net, in terms of Schedule III, or such other provision, as the case may be, in any given case. In the case in hand, there is absolutely no material for the Revenue to show that 'spent grain' is an article that could be subjected to taxation, with reference to any entry in Schedule III, where such articles

of goods are specifically mentioned. Therefore, the goods in question, namely 'spent grain', which is a residue of the process of production of 'beer', is not chargeable with tax under the Act as it is exempted in terms of the provisions of section 6(4) of the Act. This is the irresistible conclusion on the basis of the statutory materials which govern the question in hand. This is the inexcusable conclusion and result of the plain interpretation of the relevant statutory provisions, as well. 'Spent grain' does not fall either under clause (a) or (c) of section 6(1) of the Act. On pure interpretation of the relevant statutory provisions, we hold so.

6. Bearing in mind the qualitative distinction between strict construction and purposive construction in matters relating to taxing statutes, we may point out that situational understanding and appreciation of taxing provisions under consideration is not anathema, because the ultimate object is to understand as to whether a levy of tax is statutorily provided for, within the constitutional format. We have, for ourselves, attempted to reach out at materials, with the

assistance of the learned counsel on both sides, and also by ourselves over the Internet, to familiarise ourselves with the process of manufacture of 'beer', as also, the utility to which the residue of that process, namely, 'spent grain' is put to. In the larger expanding horizon of commerce and scientific attempts to utilise all leftovers of different processes of production, we see that there are efforts being made, and suggestions extended; in the international scientific domain; to utilise 'spent grain', primarily as fodder, and even as food substitutes even for humans, particularly in exceptionally marginalised and economically challenged social groups in certain parts of the world. But, in the contextual content of a taxing statute in a land like India; particularly in the State of Kerala; with the judicial prudence that we are expected to have, we are unable to visualise that 'spent grain' would be reckoned as an edible substitute for human beings; here and now. In this view of the matter, we cannot but repel the suggestion on behalf of the Revenue as to the probable varied utility of 'spent grain' and to hold that the Revenue had established that the said substance is excluded from Sl. No.3

(three) in the First Schedule of the Act.

7.The findings rendered by the Appellate Tribunal, as are impugned in the captioned revisions, are contrary to law as held above. The Tribunal had failed to decide such questions of law, though they arose for decision in the appeals before it. It had also erroneously decided questions, fundamentally relating to the casting of the initial onus and the consequential burden of proof as to appropriate relevant entry among the classification of goods; to adjudicate and conclude as to whether the commodity in question is exempted from payment of tax or is liable to be taxed under any of the clauses of section 6 of the Act.

8.In the light of the conclusions arrived at above, the decisions rendered by the Appellate Tribunal are liable to be reversed holding that 'spent grain' does not fall either under clause (a) or (c) of section 6(1) of the Act. The captioned revisions are therefore entitled to succeed.

9.Applying the ratio of the aforesaid conclusions, the decision of the assessing authority and the

proceedings levied on that basis, as are impugned in the captioned writ petition, are liable to be quashed, as without jurisdiction.

In the result:

i.OTRV Nos.116 & 117 of 2012 are ordered holding that 'spent grain' does not fall either under clause (a) or (c) of section 6(1) of the Act; and, consequentially, setting aside the orders impugned in those revisions; including those of the Appellate Tribunal and the other statutory authorities.

ii.WP(C) No.30834 of 2013 is allowed quashing the order and proceedings impugned therein.

iii.No costs.

Sd/-
Thottathil B.Radhakrishnan, Judge

Sd/-
K.Harilal, Judge

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PS to Judge