AFR

HIGH COURT OF CHHATTISGARH AT BILASPUR

WRIT PETITION (T) NO. 263 OF 2017

• Kesharwani Enterprises, a Proprietorship Firm, through its Proprietor, Shri Mukesh Gupta, S/o Shri Kishori Lal Gupta, aged about 44 years, R/o Torwa, Guru Nanak Chowk, Bilaspur (C.G.)

… Petitioner

versus

1. State of Chhattisgarh, through Secretary, Commercial Tax Department, Mahanadi Bhavan, Naya Raipur, District Raipur (C.G.)
2. Commissioner of Commercial Tax, Raipur.
3. Assistant Commissioner, Commercial Tax, Bilaspur, Division No.II.

… Respondents

WRIT PETITION (T) NO. 98 OF 2013

• M/s SAJ Foods Products Private Limited, a company duly incorporated under the Companies Act, 1956, having its offices at Purna Bhaban, 5/1, A.J.C. Bose Road, Kolkata-700020 (W.B.) India, through its Authorized Signatory and General Manager (Commercial), Debashish Bhattacharya, aged about 42 Years, S/o Sukdev Bhattacharya, R/o Bhanjipur, P.S. & P.O. Hoogly, District Hoogly (W.B.)

… Petitioner

versus

1. Commissioner of Commercial Tax, Vanijyik Kar Bhawan, Raipur, District Raipur (C.G.)
2. Commercial Tax Officer, Circle-9, Raipur, District Raipur (C.G.)

… Respondents

WRIT PETITION (T) NO. 1 OF 2016

• M/s SAJ Food Product (P) Ltd., through its General Manager- Legal & Corporate Affairs, Sri Debasish Bhattacharya, S/o Shri Sukhdev Bhattacharya, aged about 45 years, having Office at Ring Road No.2, Rawabhata, District Raipur (C.G.)

… Petitioner

versus

1. State of Chhattisgarh, through Secretary, Commercial Tax, Mahanadi Bhawan, Naya Raipur, Raipur (C.G.)
2. Commissioner, Commercial Taxes, Chhattisgarh, Civil Lines, Raipur, (C.G.)

… Respondents

WRIT PETITION (T) NO. 4 OF 2016

• M/s SAJ Food Product (P) Ltd., through its General Manager- Legal & Corporate Affairs, Sri Debasish Bhattacharya, S/o Shri Sukhdev Bhattacharya, aged about 45 years, having Office at Ring Road No.2, Rawabhata, Raipur, District Raipur (C.G.)

… Petitioner

versus

1. State of Chhattisgarh, through Secretary, Commercial Tax, Mahanadi Bhawan, Naya Raipur, District Raipur (C.G.)

2. Commissioner, Commercial Tax, Chhattisgarh, Civil Lines, Raipur, District Raipur (C.G.)

… Respondents

WRIT PETITION (T) NO. 3 OF 2016

• M/s SAJ Food Product (P) Ltd., through its General Manager- Legal & Corporate Affairs, Sri Debasish Bhattacharya, S/o Shri Sukhdev Bhattacharya, aged about 45 years, having Office at Ring Road No.2, Rawabhata, District Raipur (C.G.)

… Petitioner

versus

1. State of Chhattisgarh, through Secretary, Commercial Tax, Mahanadi Bhawan, Naya Raipur, District Raipur (C.G.)
2. Commissioner, Commercial Tax, Chhattisgarh, Civil Lines, Raipur, District Raipur (C.G.)

… Respondents

• Mr. Neelabh Dubey, Advocate, for the Petitioner, in WPT No. 263/2017 and WPT No. 98/2013.
• Mr. Anup Majumdar, Advocate, for the Petitioner, in WPT No. 1/2016, WPT No. 4/2016 and WPT No. 3/2016.
• Mr. Anand Dadariya, Dy. Govt. Advocate, for the Respondent-State.

Hon'ble Shri Justice P. Sam Koshy

C A V Order

Delivered on : 05/03/2018

1. The present are five writ petitions challenging the order of assessment and the orders passed by the appellate bodies so also the recovery notice before assessment in one of the cases.
2. The core issue in all these five writ petitions is, "whether the Rusk/Toast would fall under Entry 7, *i.e.*, Bread, under Schedule-I of the Chhattisgarh Value Added Tax Act, 2005 or it would fall under the residuary entry under Part IV of Schedule-II of the said Act as claimed by the Respondents."
3. Brief facts of the case are that the petitioners before this Court in the five writ petitions are manufacturers of bakery and confectionery items. One such item which they manufacture and sell is Toast/Rusk.

4. Schedule-I of the Chhattisgarh Value Added Tax Act, 2005 (hereinafter shall be referred to as 'the VAT Act') enumerates a series of items which are tax-free goods or where the rate of tax is 0%. Entry 7 of the said Schedule is Bread (branded or otherwise). During the course of the assessment of the petitioner-establishment for levy of tax under the VAT Act, the sale of Toast from the petitioner-establishment was construed to be an item which would fall within the residuary entry under Part IV of Schedule-II as the item Rusk/Toast has not been separately specified under Schedule-I or under Part II and Part III of Schedule-II and thus levied tax at the rate of 12.5% which was later revised as 14%.

5. Except for WPT No. 98/2013, the petitioners in all the other writ petitions had challenged the assessment before the appellate authority and the appeals preferred by them also stood rejected, leading to the filing of the present writ petitions. So far as WPT No. 98/2013 is concerned it was filed straightaway at the first instance itself when the notice before assessment was issued by the respondents.

6. Claiming Rusk/Toast to be a variety of Bread, the petitioners claimed that the said item also has to be construed as if it is an item which would fall under Entry 7 of Schedule-I, *i.e.*, within the ambit of Bread.

7. It was the contention of the petitioners that Rusk/Toast so also Bread is made up of the same ingredients and the method of manufacturing also is the same. According to the petitioners, it is the difference in the moisture contents which differentiates a Bread with a Toast. The moisture content in Bread is very high and the moisture content in Toast/Rusk is very low. The dough which is used for its preparation and the method of manufacturing, *i.e.*, the baking

process, is similar except that Toast/Rusk is baked for a longer period so that moisture content gets evaporated with which the self-life of the product gets enhanced. Likewise, the Bread is baked for a very short duration so that it does not loose moisture contents and it is this moisture contents because of which the self-life of Bread is very short. According to the petitioners, since the major ingredients in both the products, *i.e.*, Bread as well as Toast/Rusk being the same, the Rusk/Toast also has to be construed as Bread and therefore they would be a tax-free product as in the case of Bread, bringing it under Entry 7 of Schedule-I.

8. It was also the contention of the petitioners that, the only difference between the two is that the dough used for preparation of Toast/Rusk is baked in a manner whereby in the process of baking it is subjected to dehumidification to remove the moisture from the contents. According to the petitioners, the burden or the onus is on the respondent authorities to establish with cogent substantive evidence to show that Toast/Rusk is not Bread so as to bring it under the residuary entry under Part IV of Schedule-II so as to impose tax on Rusk and Toast at the rate specified under the residuary entry.

9. It was the further contention of the petitioners that the dictionary meaning of Rusk also would establish that it is nothing but a slice of Bread dried and cooked again in the oven. So also the definition of Toast also is similar wherein it has been said to be a sliced Bread that has been browned by heat. According to the petitioners, Bread is a generic term which has been envisaged in Entry 7 of Schedule-I and Toast/Rusk would come under this generic term.

10. Thus, for all these contentions it was prayed by the petitioners that the impugned assessment orders and the orders passed by the

appellate authority be set aside so also the notice before assessment which has been issued also be quashed. The petitioners also prayed for an appropriate writ to be issued so that Toast and Rusk also are held to be items which would fall under the generic term of Bread under Entry 7 of Schedule-I of the VAT Act.

11. According to the petitioner it was burden upon the respondent/State to have reached to a specific conclusion that the Toast and Rusk for reasons specific would not come within the generic term so as to exclude Rusk and Toast from Entry 7 in Schedule 1 and to bring it under the purview of the residuary Entry of part 4 under Schedule 2.

12. Per contra, the State counsel opposing the petition submits that the petition is totally misconceived and does not have any merits. That under no circumstances, can a Toast or a Rusk be called a bread or *vice versa* so as to treat all these items as one and the same bringing it under the umbrella of Bread.

13. According to the State under the normal practice there are two tests which are required to determine a product. Those are the common parlance test and the commercial use test. According to the State counsel applying both the tests to determine the product even on conducting the two tests it would be explicitly clear that Bread is entirely different from Rusk and Toast, so far as the common parlance test is concerned, it was the contention of the State counsel that when a person goes shop to purchase Bread, the shopkeeper would not offer him Toast or Rusk at the same time when a person goes to buy a Toast and Rusk, he would not be offered Bread.

14. So far as the second test of commercial uses is concerned, the contention of the State counsel was that the two products i.e. Bread

and Rusk/Toast are also used for entirely different purpose and occasion. According to the State counsel the ingredients used for manufacturing of the two products i.e. Bread and Toast or Rusk are also entirely different and the process of manufacturing also is entirely different, which would establish that the Rusk and Toast cannot be brought within the purview of Bread.

15. Counsel for the State referring to the impugned order where the Tribunal has recorded the ingredients of two products, submitted that there are material differences between the ingredients that are used for manufacturing of two products. Lastly it was contended that since three of the authorities below have considered the aspect and reached to the conclusion that two products are entirely different, both so far as its ingredients are concerned and also so far as the manufacturing process is concerned, thus the petitions deserve dismissal.

16. Having heard the contentions put forth on either side and on perusal of records, what really needs appreciation is the provisions of the VAT Act. Section 10 of VAT Act deals with the composition of tax. Likewise, Section 15 deals with tax free goods which for ready reference is being reproduced as under :

> **Section 15-Tax free goods** -1. No tax shall be payable on the sale or purchase of goods specified in Schedule-I, subject to the conditions and exceptions, if any, set out in the corresponding entry in the third column thereof.
> 2. The State Government may in respect of any goods, by notification amend Schedule-I, so as to include therein any goods not already specified or may relax or omit any of the conditions and exceptions set out in the corresponding entry in the third column thereof."

17. A plain reading of Section 15 of the VAT Act itself would show that all those products which are specified in Schedule-I, tax shall not be payable on the sale and purchase of said products. Entry-7 of the said Schedule clearly refers to products both Bread or otherwise. Likewise, Schedule-II of the said Act also envisages a list of products. What is also relevant is that the products which have been specified in part-II of Schedule-II, the rate of tax levied is prescribed. Likewise, part-IV of the said schedule-II envisages that “all those goods which are not included in schedule-I, part-II and III of the said schedule” have fixed the rate of tax at 14 percent. The said entry in the schedule i.e. Part -IV is normally referred to as residuary entry.

18. According to respondent-State since under schedule-I entry-7, it is only Bread which has been referred to under entry-7 in schedule-I and Rusk and Toast not having been expressly given in any of the entries under any of the schedule, under such circumstances, what is required to be ascertained is whether the Rusk or Toast can be brought within the ambit of entry-7 under schedule-I to make these products also tax free. Further, what also requires consideration is that in the absence of any specific entry so far as Rusk and Toast is concerned under the Act or in the schedule, whether it will fall under residuary clause.

19. Now for better understanding the submissions put forth in the preceding paragraphs or for proper determination of the issues framed in the preceding paragraphs, it would be relevant at this juncture to refer to the definition of Rusk and Toast. According to Black's Law Dictionary, the definition of Toast so also definition of Rusk is as under:

> **Toast –** Sliced bread that has been browned by heat.

> **Rusk –** A slice of sweet raised bread dried and cooked again in the oven.

20. So far as Webster dictionary is concerned, Toast has been defined as “sliced Bread browned on both side by heat”. Likewise, Rusk has also been defined as “the sweet or a plain Bread baked until dry and crisp”.

21. Now, if we further refer to the chart as produced in the impugned order showing the ingredients of two products, it would clearly reveal that majority of the ingredients are the same and the differences of ingredients in the two products are minuscule. In fact, the basic ingredients which are required are the same and it is only the duration of baking which makes the difference between the two products. The baking of Bread is for a lessor period ensuring that the moisture and water contents does not get finished. On the contrary, for the purpose of Toast/Rusk, it is baked for a longer period. The moisture contents is reduced to the minimum by adopting the process of dehumidification.

22. Now we proceed to consider the aspect as to how the entries made in the schedule have to be understood or looked into.

23. In 2008 (5) SCC 680 in case of Mauri Yeast India Pvt. Ltd. Vs. State of Uttar Pradesh and Another, Supreme Court in paragraphs 34,48 and 56 held as under :

> “34. It is now a well settled principle of law that in interpreting different entries, attempts shall be made to find out as to whether the same answers the description of the contents of the basic entry and only in the event it is not possible to do so, recourse to the residuary entry should be taken by way of last resort.”
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> 48. There cannot be any quarrel with the proposition that

> construction of the word is to be adopted to the fitness of the matter of the statute. But for determining the said question, several factors which would be relevant are required to be gone into. The trade or commercial meaning or the end user context would, thus, be a relevant factor.
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> 56. We, therefore, are of the opinion that if there is a conflict between two entries one leading to an opinion that it comes within the purview of the tariff entry and another the residuary entry, the former should be preferred."

24. In 1990 (1) SCC 532, in case of M/s Bharat Forge and Press Industries (P) Ltd. Vs. Collector of Central Excise, Baroda, Gujarat, the Supreme Court in paragraph 4 has held that only such goods which cannot be brought under the various specific entries in the tariff schedule should be attempted to be brought under the residuary entry. In other words, unless the department can establish that the goods in question can by no conceivable process of reasoning be brought under any of the tariff items, resort can be had to the residuary item.

25. It is also well settled principle of law that when two views are possible, one which favours the assessee should be adopted.

26. So far as, whether the Toast or Rusk would fall under the residuary entry under part-IV, the burden of proof is on the State Government and the onus also lies on them to first establish conclusively that by no conceivable process of reasoning can the said product be brought under any of the tariff items and hence the product was being brought under the residuary item.

27. So far as the issue of bringing an item under the residuary entry, it is the primary and paramount responsibility of the State to first convincingly prove and establish that the item under no circumstances can be brought under any of the tariff items under the schedule of the VAT Act. Only then could the Government claim a particular product to be one which would come under the residuary entry. The Hon'ble Supreme Court in this regard dealing on the classification of goods and the onus of proof in the case of "***Commissioner of Central Excise, Calcutta v. Sharma Chemical Works***", reported in ***(2003) 5 SCC 60***, in paragraph No.12 has held as under:

> ***"12. We have heard the parties and considered the submissions made by them. We have also read the opinion of the majority Bench and the minority opinion of the Technical Member. It is a settled law that the onus or burden to show that a product fall within a particular Tariff Item is always on the revenue. Mere fact that a product is sold across the counters and not under a Doctors prescription does not by itself lead to the conclusion that it is not a medicament. We are also in agreement with the submission of Mr. Lakshmikumaran that merely because the percentage of medicament in a product is less does not ipso facto mean that the product is not a medicament. Generally the percentage or dosage of the medicament will be such as can be absorbed by the human body. The medicament would necessarily be covered by fillers/vehicles in order to make the product usable. It could not be denied that all the ingredients used in Banphool Oil are those which are set out in the Ayurveda text Books. Of course the formula may not be as per the text books but a medicament can also be under a patented or proprietary formula. The main criteria for determining classification is normally the use it is put to by the customers who use it. The burden of proving that Banphool Oil is understood by the customers as an hair oil was on the revenue. This burden is not discharged as no such proof is adduced. On the contrary we find that the oil can be used for treatment of headache, eye problem, night blindness reeling head weak memory, hysteria amnesia blood pressure, insomnia etc. The dosages required are also set out on the label. The product is***

> ***registered with Drug Controller and is being manufactured under a drug licence."***

"It is settled law that the onus or burden to show that a product falls within a particular tariff item is always on the revenue."

28. A similar view further also taken by the Hon'ble Supreme Court in yet another decision in the case of "***Puma Ayurvedic Herbal (P) Ltd. v. Commissioner, Central Excise, Nagpur***" reported in ***(2006) 3 SCC 266***, wherein paragraph No.8 has reiterated the aforesaid principle and held that:

> ***"It is settled law that the burden of showing correct classification lies on the revenue."***

If we look at the facts of the instant case there does not appear to have been any strong evidence led by the revenue before the authorities to establish the fact that the matter would not fall within the entry item "bread" as is reflected under schedule-1, entry-7 of the VAT Act."

29. In 1953, the High Court of Hyderabad dealing with a similar issue in a matter which is reported in ***1953 (4) STC 387*** in the case of "***Kayani and Co. vs. Commissioner of Sales Tax***", while considering the definition of bread under the provisions of Hyderabad General Sales Tax Act in paragraph No.2 held as under:-

> ***"When the Legislature uses a term relating to any article of food, we must construe it in the sense in which it is understood in this country and not elsewhere. In fact bread which is commonly lebelled as a loaf of bread in Europeon countries has a particular name in this country and is called a "double roti" thereby distinguishing it from ordinary "roti" which is synonymous with a loaf of bread. In this country, it is not unusual for a descriptive prefix to cannote the kind of bread such as "Jawari-ki-roti, Bajre-ki-roti, Makai-ki-roti, Gheon-ki-roti" etc. In our view the intention of the Legislature is to include all kinds of bread which are consumed by the citizens of India, whether prepared in different ways or called by***

different names. There is no justification for limiting the scope of the term bread to a particular kind, such as "double roti" as contended by the learned Advocate for the Commissioner of Sales Tax. The intention of the Legislature is further made clear in the amended Schedule I which was substituted by Act XXVIII of 1952, where the term "bread" in item 3 thereof includes "double roti, chapathi, kulcha and shirmal". This inclusive definition of the word "bread" negatives the contention of the learned Advocate that by "bread" is only meant "double roti", and no other kind of roti. If his contention was right, there was nothing to prevent the word "double roti" for the word "bread" nor can we justifiably infer that the exemption is only meant for the very limited class of citizens who consume "double roti" while levying the tax on vast majority of citizens who do not consume that article of food. We are, therefore, not impressed by the contention that articles for which exemption is claimed were not included in the word "bread". In our view, "bread" includes and should include all forms or kinds of bread which are prepared by moistening, kneading, baking, frying or roasting meal or flour with or without the addition of yeast, leaven or any other substance for puffing or lightening the article."

30. Again a similar matter came up for consideration before the Division Bench of Kerala High Court in a matter which is reported in ***1993 (88) STC 9 (KER)*** in the case of ***"Modern Food Industries (India) Ltd. v. Assistant Commissioner (Assessment), Sales Tax Special Circle and Others"*** wherein again in a dispute between "Bun" and "Bread", the Division Bench of Kerala High Court dealing with the issue in paragraphs No. 9 to 11 held as under:-

9. It is emphasised that bread is manufactured and marketed in different names and forms to suit the tastes and requirements of the consumers.

10. Further factual details about the components and the process have been given in the additional affidavit dated July 30, 1990. It is stated:

> ***"The ingredients of bread and bun are maida, sugar, salt, fat, yeast, glycerine mono stala, vitamin premix, potassium bromate, acetic acid and calcium propionate. The manufacturing process is also the same. The flour is sifted and the raw materials are***

> ***mixed with water to form a dough. It is then fermented and remixed. The remixed dough is allowed a short resting period before it is divided to form each bread or bun. It is then founded, moulded, panned, pruned to the required volume and baked. The baked bread is cooled to room temperature and sliced and packed. The cooled bun is directly packed without slicing. In bun the percentage of yeast is more than bread."***
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> ***11. The variety of the breads made and sold by the petitioners is reflected in the enumeration: "White bread, sweet bread, Kairali special, milk bread and fruity". The ingredients are virtually the same with marginal difference in their percentage. Bun contains more of yeast. Additional ingredients are there in milk bread and in fruity. A document-daily production and raw material control report-has been produced along with the affidavit to demonstrate the ingredients of each variety of bread and bun. That statement confirms the correctness of the allegations of the petitioner."***

31. Recently, the Division Bench of the High Court of Punjab & Haryana in the case of "***M/s. S.R. Foils and Tissue Limited v. The State of Haryana and Another***" decided in ***VATAP No. 73 of 2011 (O&M)*** on ***27th of October, 2016*** in paragraph No. 23 has held as under:

> ***"23. If the case of the appellant is considered in the light of enunciation of law, as referred to above, Entry 57 in Schedule 'C' only prescribes 'paper', 'paper board' and 'newsprint'. It does not provide for any inclusions or exclusions. It further does not provide for any user test. The word 'paper' used in the Entry is in generic form, which will include all types of paper, which has its essential characteristics. It is not in dispute that even the tissue paper, napkin, toilet paper rolls etc. retain the essential characteristics of paper. It is only that it is in different strength and is used for different purposes. There is no competing entry to find out whether product falls in entry 'A' or 'B'. The residuary entry is to be invoked in case with liberal construction to the specific entry, the product could not be found to be forming part thereof."***

32. Yet another recent decision of the Division Bench of Delhi High Court in the matter of "***Samsung India Electronics Private Limited***

v. Government of NCT of Delhi and Ors. " reported in ***2017 (97) VST 417 (Delhi)*** in paragraphs No. 41 to 44 has held as under:

> ***"41. In Commissioner of Sales Tax v. Agarwal & Co. 1983 (12) ELT 116 (Bom), the question was whether 'milk' occurring in Entry 36 of Schedule A of the Bombay Sales Tax Act, 1959 includes 'milk powder' as well. It was held that milk would not only include milk in liquid form but all types of milk. It was held that while looking at the words of an Entry in the Sales Tax legislation, it was permissible to examine the legislative history of the said Entry. It was pointed out that "while interpreting a general term used for describing any commodity in any fiscal legislation, the general term so used covers that commodity or item or article in all its forms and varieties". It was accordingly observed that milk in powder form can be looked upon as a result of this continually evolving technology. There is no reason why it should be excluded from the generic term 'milk'.***
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> ***42. In Dunlop India Ltd. v. Union of India, reported in 1983 (13) ELT 1566, it was reiterated that "when an article has, by all standards, a reasonable claim to be classified under an enumerated item in the Tariff Schedule, it will be against the very principle of classification to deny it the percentage and consign it to an orphanage of the residuary clause".***
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> ***43. In HPL Chemicals Ltd. v. Commissioner of Central Excise reported in 2006(197) ELT 324 (SC), the question was of classification of 'denatured salt'. The Court disagreed with the Department of Excise in that case that the said product was classifiable under the residuary Heading No.38.23 and not Heading 25.01 of the Central Excise Tariff Act, 1985 which was a specific heading. The Court observed as under:***
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>> ***"This apart, classification of goods in a matter relating to chargeability and the burden of proof is squarely upon the Revenue. If the Department intends to classify the goods under a particular heading or sub-heading different from that claimed by the assessee, the Department has to adduce proper evidence and discharge the burden of proof. In the present case the said burden has not been discharged at all by the Revenue. On the one hand, from the trade and market enquiries made by the Department, from the report of the Chemical Examiner, CRCL and from HSN, it is quite clear that the goods are classifiable as "Denatured Salt" falling under Chapter Heading No. 25.01. The Department has***

> ***not shown that the subject product is not bought or sold or is not known or is dealt with in the market as Denatured Salt. Department's own Chemical Examiner after examining the chemical composition has not said that it is not denatured salt. On the other hand, after examining the chemical composition has opined that the subject matter is to be treated as Sodium Chloride."***
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> ***44. In Sun Export Corporation v. Collector of Customs, Bombay reported in 1997 (93) ELT 641 (SC), the Supreme Court reiterated the well settled principle that if in a matter of classification of goods two views were possible, the one favouring the Assessee has to be preferred."***

33. Given the aforesaid decisions by the various High Courts as well as by the Hon'ble Supreme Court when we compare the principles laid down in the aforesaid judgments and compare them with the definition of "Bread" and definition of "Toast and Rust" and further also taking into consideration the ingredients required for the preparation of the two products, this Court has no hesitation in reaching to the conclusion that there is substantially no change in the basic physical properties used for manufacturing of Bread as well as Toast and Rusk. It is only the manufacturing process and that too restricted to the time required for baking of the two products everything else is the same.

34. Under the factual circumstances, this Court is also of the opinion that the term 'Bread' under schedule-1, entry-7 has to be construed as a generic entry made and it has to be given the widest interpretation that could be given, subject to the condition that the ingredients being substantially the same. Thus, this Court holds that Rust and Toast also would fall within entry-7 of schedule-1 of the VAT Act and it cannot be considered to be one which would come under the residuary entry.

35. As a consequence, the impugned orders in all these writ petitions stand quashed/set-aside with consequences to follow. Accordingly all these writ petitions stands allowed and disposed of.

Sd/-
(P. Sam Koshy)
Judge

/ved/