

HIGH COURT OF CHHATTISGARH, BILASPUR

Writ Petition (T) No.34 of 2016

Order reserved on : 3-5-2018

Order delivered on : 18-6-2018

M/s. Shrikishan & Company, S-1 Shree Complex, T.P. Nagar, Stadium Road, Korba (C.G.) through Proprietor Sushil Kumar Agrawal, aged about 48 years, S/o Late Shrikishan Agrawal, R/o Darri Road, Korba, P.O. Korba, P.S. Kotwali, Korba, Tehsil & District Korba (C.G.)

---- Petitioner

Versus

1. Additional Commissioner of Commercial Tax, Vanijyik Kar Bhavan, Civil Lines, Raipur (C.G.)
2. Assistant Commissioner of Commercial Tax, Bilaspur, Vanijyik Kar Bhavan, Near Nehru Chowk, Mungeli Road, Bilaspur (C.G.)
3. Additional Deputy Commissioner of Commercial Tax, Raipur, Vanijyik Kar Bhavan, Civil Lines, Raipur (C.G.)
4. State of Chhattisgarh, through Secretary, Department of Commercial Taxes, Mantralaya, Naya Raipur (C.G.)

---- Respondents

Writ Petition (T) No.35 of 2016

M/s. Shrikishan & Company, S-1 Shree Complex, T.P. Nagar, Stadium Road, Korba (C.G.) through Proprietor Sushil Kumar Agrawal, aged about 48 years, S/o Late Shrikishan Agrawal, R/o Darri Road, Korba, P.O. Korba, P.S. Kotwali, Korba, Tehsil & District Korba (C.G.)

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Versus

1. Additional Commissioner of Commercial Tax, Vanijyik Kar Bhavan, Civil Lines, Raipur (C.G.)
2. Assistant Commissioner of Commercial Tax, Korba (C.G.)
3. Additional Deputy Commissioner of Commercial Tax, Raipur, Vanijyik Kar Bhavan, Civil Lines, Raipur (C.G.)

4. State of Chhattisgarh, through Secretary, Department of Commercial Taxes, Mantralaya, Naya Raipur (C.G.)
---- Respondents

AND

Writ Petition (T) No.36 of 2016

M/s. Shrikishan & Company, S-1 Shree Complex, T.P. Nagar, Stadium Road, Korba (C.G.) through Proprietor Sushil Kumar Agrawal, aged about 48 years, S/o Late Shrikishan Agrawal, R/o Darri Road, Korba, P.O. Korba, P.S. Kotwali, Korba, Tehsil & District Korba (C.G.)

---- Petitioner

Versus

1. Additional Commissioner of Commercial Tax, Vanijyik Kar Bhavan, Civil Lines, Raipur (C.G.)
2. Assistant Commissioner of Commercial Tax, Korba (C.G.)
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4. State of Chhattisgarh, through Secretary, Department of Commercial Taxes, Mantralaya, Naya Raipur (C.G.)
---- Respondents

For Petitioner: Mr. Siddharth Dubey, Advocate.

For Respondents / State: -

Mr. Anand Dadariya, Deputy Govt. Advocate.

Hon'ble Shri Justice Sanjay K. Agrawal

C.A.V. Order

1. The petitioner is a sole proprietorship firm involved in the execution of works contract using bitumen emulsion purchased from unregistered dealers outside the State and paying purchase tax on the said purchase of bitumen emulsion. The assessment orders for the assessment years 2006-07, 2007-08 and 2008-09 were passed on 21-1-2008, 1-5-2009 and 1-5-2010, respectively, and reassessment order for all three assessment years was passed on

7-1-2013. Reassessment took place mainly on the ground that the correct rate of tax applicable with respect to bitumen emulsion purchased by the petitioner outside the State is covered by residual entry of schedule annexed with the Act and rate of tax would be 12.5% and would not be 4% as per Entry-23 of Schedule-II of Part II of the Chhattisgarh Value Added Tax Act, 2005 and accordingly, additional tax liability was imposed upon the petitioner which was challenged in revision under Section 49(1) of the Chhattisgarh Value Added Tax Act, 2005 (for short, 'the VAT Act'). The revisional authority partly allowed the revision reducing the additional tax liability. Feeling aggrieved and questioning that order, this batch of writ petitions have been filed.

2. Since common question of law and fact is involved in this batch of writ petitions, they are heard analogously and are being disposed of by this common order.
3. Mr. Siddharth Dubey, learned counsel appearing for the petitioner, would submit that bitumen emulsion is covered by Entry-23 under Part II of Schedule-II of the VAT Act and the correct rate applicable would be 4% as per Entry-23 of schedule annexed with the VAT Act. He would further submit that while interpreting different entries, attempts should 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. If two views are possible, one which favours the assessee should be adopted.

In case of 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. He would rely upon a decision of the Supreme Court in the matter of Mauri Yeast India Private Limited v. State of Uttar Pradesh and another¹ and also rely upon the case of Commissioner of Commercial Tax, Uttar Pradesh v. A.R. Thermosets Private Limited². He would lastly submit that Entry-23 under Part II of Schedule-II of the VAT Act only uses bitumen (coal-tar) which means that bitumen is commercially known as coal-tar and in its common and commercial parlance coal-tar has been used which does not mean any variation or condition in the entry which contains bitumen. It is covered by the decision of the Supreme Court in A.R. Thermosets Private Limited's case (supra). Learned counsel for the petitioner would also submit that emulsified bitumen, being a part or product of bitumen itself, cannot be classified under residuary entry, as use of bitumen and emulsified bitumen is one and the same and emulsified bitumen is made out of or is a product of bitumen with no physical or chemical changes in it and therefore both the authorities are absolutely unjustified in holding that emulsified bitumen would not fall under Entry-23 of Schedule-II, Part II of the VAT Act.

4. Mr. Anand Dadariya, learned Deputy Government Advocate appearing for the State/respondents, would submit that Entry-23

1 (2008) 5 SCC 680

2 (2016) 16 SCC 122

under Part-II of Schedule-II of the VAT Act specifies about bitumen (coal-tar), therefore, bitumen emulsion is not included in the said entry as such, residuary entry under Part-IV of Schedule-II would be applicable. He would further submit the case of the petitioner is covered by a decision rendered by the M.P. High Court in the matter of Tiki Enterprises and another v. Commissioner of Commercial Tax, M.P., Indore³.

5. I have heard learned counsel for the parties and considered their rival submissions made herein-above and went through the record with utmost circumspection.
6. It is the case of the petitioner that he is paying purchase tax on purchase of bitumen emulsion from unregistered dealers outside the State and using the same / bitumen in execution of works contract. Section 9 of the VAT Act pertaining to purchase tax is reproduced below: -

“9. Levy of Purchase Tax – (1) Every dealer who in the course of his business purchases any goods specified in schedule II from any person other than a registered dealer or from a registered dealer in the circumstances in which no tax under Section 8 is payable by that registered dealer on the sale price of such goods except where the goods are tax-paid goods within the meaning of clause (x) of Section 2, shall be liable to pay tax on the purchase price of such goods if,-

(a) after their purchase, the goods are not sold within the State of Chhattisgarh or in the course of inter-State trade or commerce or in the course of export out of the territory of India but are sold or disposed of otherwise, or consumed or used in the manufacture of goods declared tax-free under Section 15 and Section 15(b) which are disposed off otherwise than by way of sale in the course of export out of the territory of India; or

³ 2009(4) MPLJ 374

(b) such goods covered by part III of Schedule II and/or Schedule III are used or consumed in the manufacture of goods; or

(c) such goods covered by part I, II and IV of schedule II and not covered by schedule III, after use or consumption in the manufacture of any goods specified in schedule II, the manufacture goods are disposed of otherwise than by way of sale in the state of Chhattisgarh or in the course of inter-state trade or commerce or in the course of export out of the territory of India,

and such tax shall be levied, –

(i) in respect of goods referred to in clauses (a) and (b) at the rate specified in column (3) of schedule II, and

(ii) in respect of goods referred to in clause (c) at 4% or at the rate specified in column (3) of schedule II whichever is lower.

Explanation – The rate of tax specified in schedule II shall be the rate at which tax would have been levied on the sale of such goods within the State on the date of such purchase.

(2) No tax under this section shall be levied in respect of any year on –

(a) A dealer whose turnover in a year does not exceed the limit prescribed under sub-section (1) of section 4;

(b) Any other dealer who has no turnover, if his aggregate of purchase prices of all the goods does not exceed such amount as may be prescribed.

(3) Every dealer who has no turnover and is liable to pay tax under sub-section (1) shall, for the purpose of Sections 19, 21, 22, 25, 26 and 41, be deemed to be a registered dealer.”

7. Thus, in the light of the above-stated provision, it is quite vivid that purchase tax would be levied at the rate at which tax would have been levied on the sale of such goods within the State of Chhattisgarh.

8. The learned revisional authority relying upon **Tiki Enterprises** (supra) has clearly held that bitumen emulsion is different from bitumen (coal-tar) as employed in Entry-23 under Part II of Schedule-II of the VAT Act and therefore residuary article would apply and rate of tax would be 12.5% for bitumen emulsion purchased by the petitioner.
9. At this stage, it would be appropriate to pause here and to notice the principles of law relating to interpretation of tariff entry. Justice G.P. Singh in his celebrated book "**Principles of Statutory Interpretation**" (14th Edition) at page 874 has held that the taxing entries have to be construed with clarity and precision so as to maintain this exclusivity.
10. In the matter of **M/s Bharat Forge and Press Industries (P) Ltd. v. Collector of Central Excise, Baroda, Gujarat**⁴, the Supreme Court has held in no uncertain terms 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.
11. Likewise, in the matter of **Commissioner of Central Excise, Calcutta v. Sharma Chemical Works**⁵, the Supreme Court has held authoritatively that it is the primary and paramount

4 (1990) 1 SCC 532

5 (2003) 5 SCC 60

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 Act. It has been further held that classification of goods and the onus of proof lies on the Revenue. Their Lordships of the Supreme Court succinctly 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.”

12. Similar proposition has been held in the matter of Puma Ayurvedic Herbal (P) Ltd. v. Commissioner, Central Excise,

Nagpur⁶ by observing as under: -

“It is settled law that the burden of showing correct classification lies on the revenue.”

13. In **Mauri Yeast India Private Limited** (supra), Their Lordships of the Supreme Court have held in so many words laying down the law relating to interpreting different entries, 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.”

14. Recently, in **A.R. Thermosets Private Limited's** case (supra), Their Lordships of the Supreme Court have held that residuary entry is made to cover only those category of goods which clearly fall outside the ambit of the main entry. It has been further held as under: -

“20. ... In *State of Maharashtra v. Bradma of India Ltd.*⁷, the Court had observed that the general principle is that specific entry would override a general entry. Referring to the decision in *CCE v. Wood Craft Products Ltd.*⁸, it has been ruled that resort can be made to a residuary heading only when by liberal construction the specific entry cannot cover the goods in question. ...”

21. A similar opinion has been expressed in *Hindustan Poles Corpn. v. CCE*⁹ stating that residuary entry is made to cover only those category of goods which clearly fall outside the ambit of the main entry. The opinion proceeds further to state that unless the Revenue can establish that the goods in question can by no conceivable process of reasoning be brought under any of the tariff items, resort cannot be made to the residuary entry.”

6 (2006) 3 SCC 266

7 (2005) 2 SCC 669

8 (1995) 3 SCC 454

9 (2006) 4 SCC 85

15. It is not in dispute and very well-settled principle of law that when two views are possible, one which favours the assessee should be adopted. (See Bihar SEB v. Usha Martin Industries¹⁰ and Mauri Yeast India Private Limited (supra).)

16. In Mauri Yeast India Private Limited (supra), the Supreme Court has finally concluded that if there is a conflict between two entries, the course adopted to be followed would be as follows: -

“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.”

17. Having noticed the principle of law relating to interpretation of tariff entry and when the residuary entry has to be resorted in the relevant Act, reverting to the dispute brought before the Court, the question involved is, whether the assessing authority and the revisional authority are justified in holding that bitumen emulsion would not fall within Entry 23 under Part II of Schedule-II appended to the VAT Act and would fall within the residuary entry and VAT would be chargeable at the rate of 12.5%?

18. In order to resolve the dispute in the light of the principles of law mentioned herein-above, it would be appropriate to notice Entry 23 under Part II of Schedule-II of the VAT Act. Under the said Entry, bitumen (coal-tar), the rate of tax payable is 4%. It is the case of the State / respondents that the petitioner is purchasing bitumen emulsion which is not covered by Entry 23 of the Act, because in the said Entry, the meaning of bitumen is conditioned by coal-tar

¹⁰ (1997) 5 SCC 289

which is within brackets. Entry 23 and residuary entry provide as under: -

Schedule – II
(See section 8)

PART I

S.No.	Description of Goods	Rate of tax u/s 8 (percent)
(1)	(2)	(3)
1 to 22	xxx xxx xxx	xxx
23.	Bitumen (Coal-Tar)	4

(Bitumen emulsion inserted with effect from 1-6-2013). 4% enhanced to 5% by Notification dated 26-12-2009, with effect from 1-1-2010.

PART II and PART III

xxx xxx xxx
xxx xxx xxx
xxx xxx xxx

PART IV

S.No.	Description of Goods	Rate of tax u/s 8 (percent)
(1)	(2)	(3)
1.	All other goods not included in Schedule I and in Part I, II and III of this Schedule	12.5

(12.5% enhanced to 14% by Notification No.(44-A) dt. 26-12-2009 with effect from 1-1-2010.)

19. At this stage, it would be appropriate to notice whether use of bitumen and bitumen emulsion is one and same or both are different commodities. It is no more res integra and stand decided

by the Supreme Court.

20. The Supreme Court in **A.R. Thermosets Private Limited's** case (supra) considered the question as to whether bitumen and bitumen emulsion are one and the same commodity for the purposes of interpretation of Entry 22 of Part A of Schedule II to the U.P. Value Added Tax Act, 2008 as was originally enacted and whether “bitumen emulsion” is covered within Entry 22 of Part A of Schedule II to the U.P. Value Added Tax Act, 2008 which only refers to “bitumen”. Their Lordships after detailed analysis of various dictionaries as well as Encyclopedia of Science and Technology defining “bitumen” held that the entry in question uses the word “bitumen” without any further stipulation or qualification and further held that bitumen emulsion is processed bitumen. Their Lordships finally held that in popular and commercial sense, bitumen emulsion is nothing but bitumen, which is in liquid form and is user-friendly. It was observed as under: -

“15. A reading of the aforesaid definitions and the scientific text clearly reveal that bitumen in its original form is solid but melts when heated, for it is used in molten stage. There is no difficulty to appreciate that bitumen emulsion comes into existence when bitumen is treated with emulsifiers and other chemicals to attain a liquid form. It has a huge advantage and add benefit because it is not to be heated and detained in its liquid form and has better stability and thus, saves time and cost components. That apart, it ensures its use at the stage of application. Needless to say it is comparatively less hazardous.

18. The entry in question uses the word “bitumen” without any further stipulation or qualification. Therefore, it would, in our opinion, include any product which shares the composition identity, and in common and commercial parlance is treated as bitumen and can

be used as bitumen. When we apply the three tests, namely, identity, common parlance and end-use to the goods and the entry in question, bitumen emulsion would be covered by the entry bitumen. It is worthy to note that bitumen emulsion matches the entry as it is only one of the varieties of bitumen. Bitumen emulsion is processed bitumen, but the process has not changed its composition, commercial identity or its use. Bitumen emulsion is regarded and performs the same function as bitumen. As a result of processing, neither the primary character nor the composition is lost. Emulsification only eases and provides proficiency to the use of application of bitumen. Hence, in popular and commercial sense, bitumen emulsion is nothing but bitumen, which is in liquid form and is user-friendly.

19. It is perceivable that the legislature has used the word "bitumen" and treated it as a separate entity. As we notice, it has not indicated that this was done with the intention and purpose to exclude some type or variety of bitumen. All bitumen products, which share and have common composition and commercial entity, and meet the popular parlance test, is, therefore, meant to be covered by the said entry. In the instant case, even the end-use test is satisfied. There is nothing in the entry to suggest and show that the entry is required to be given a restrictive and a narrow meaning."

21. Following the principle of law laid down by the Supreme Court in

A.R. Thermosets Private Limited's case (supra), in the instant case, it is held that bitumen as used in Entry 23 under Part II of Schedule-II appended to the VAT Act, bitumen emulsion is nothing but bitumen. But here the submission is, in the said Entry, bitumen is conditioned by word coal-tar (in front of the word bitumen), therefore, the word inside the brackets i.e. coal-tar would control the meaning of the word "bitumen".

22. As per the dictionary meaning, bracket is usually called as parenthesis. The question would be whether the words inside the parenthesis / brackets would control the scope of the words outside it. To put it differently, whether the words within the

parenthesis are merely illustrative or it is exhaustive.

23. The Merriam-Webster's Collegiate Dictionary, Eleventh Edition, defines the word 'parenthesis' as under :

“parenthesis- act of inserting, to insert, to place **1a** : an amplifying or explanatory word, phrase, or sentence inserted in a passage from which it is usu. set off by punctuation **b** : a remark or passage that departs from the theme of a discourse : DIGRESSION **2** : INTERLUDE, INTERVAL **3** : one or both of the curved marks () used in writing and printing to enclose a parenthetical expression or to group a symbolic unit in a logical or mathematical expression.”

24. Likewise, the Grolier New Webster's Dictionary defines the word 'parenthesis' as under :-

“parenthesis- a word, phrase or sentence, usually having its own complete meaning, inserted into a sentence which is grammatically complete without this insertion, and marked off from it by punctuation || either of the punctuation marks (or) used to contain such a word, phrase etc., to insert parentheses in (a speech etc.) || to insert (a word etc.) in a sentence as a parenthesis || to place parentheses around (a written word etc.).”

25. It appears that the purpose of a parenthesis is ordinarily to insert an illustration, explanation, definition, or additional piece of information of any sort into a sentence that is logically and grammatically complete without it. In other words, a parenthesis is defined to be an explanatory or qualifying clause, sentence, or paragraph, inserted in another sentence, or in the course of a longer passage, without being grammatically connected with it.
26. In this regard, a reference can be made to the judgment of the Supreme Court in the matter of Fuerst Day Lawson Limited v.

Jindal Exports Limited¹¹. The question for consideration before the Supreme Court was whether an order, though not appealable under Section 50 of the Arbitration and Conciliation Act, 1996, would nevertheless be subject to an appeal under the relevant provisions of the letters patent of the High Court. The Supreme Court while considering the issue held that Section 50 of the Arbitration and Conciliation Act, 1996, unlike Section 39 of the Arbitration Act, 1940 and Section 37 of the Arbitration and Conciliation Act, 1996 did not have the words “(and from no others)” and that made all the difference. It was further held that it would be subject to an appeal under the letters patent of the High Court and observed as under: -

“45. According to the New Oxford Dictionary of English, 1998 Edition, brackets are used to enclose words or figures *so as to separate them from the context*.

46. Oxford Advanced Learner's Dictionary, Seventh Edition, defines 'bracket' to mean—

'either of a pair of marks, () placed around *extra information* in a piece of writing or part of a problem in mathematics.' (emphasis supplied)

47. The New Oxford Dictionary of English, 1998 Edition, gives the meaning and use of parenthesis as:

'*Parenthesis*-noun (pl. parentheses) a word, clause, or sentence *inserted as an explanation or afterthought into a passage which is grammatically complete without it*, in writing usually marked off by brackets, dashes, or commas.

—(usu. Parentheses) a pair of round brackets () used to include such a word, clause, or sentence.' (emphasis supplied)

48. Oxford Advanced Learner's Dictionary, Seventh

11 (2011) 8 SCC 333

edition, defines the meaning of parenthesis as:

'a word, sentence, etc. that is added to a speech or piece of writing, *especially in order to give extra information*. In writing, it is separated from rest of the text using brackets, commas or dashes.'

49. *The Complete Plain Words* by Sir Ernest Gowers, 1986 revised edition by Sidney Greenbaum and Janet Whitcut, gives the purpose of parenthesis as follows:

'Parenthesis-The purpose of a parenthesis is ordinarily to insert an illustration, explanation, definition, or additional piece of information of any sort into a sentence that is logically and grammatically complete without it. A parenthesis may be marked off by commas, dashes or brackets. The degree of interruption of the main sentence may vary from the almost imperceptible one of explanatory words in apposition, to the violent one of a separate sentence complete in itself.' (emphasis supplied)

50. The *Merriam-Webster Online Dictionary* defines 'parenthesis' as follows:

'1 a : an amplifying or explanatory word, phrase, or sentence inserted in a passage from which it is usually set off by punctuation b : a remark or passage that departs from the theme of a discourse : digression

2 : INTERLUDE, INTERVAL

3: one or both of the curved marks () used in writing and printing to enclose a parenthetical expression or to group a symbolic unit in a logical or mathematical expression.'

51. The *Law Lexicon, The Encyclopaedic Law Dictionary* by P. Ramanatha Aiyar, 2000 Edition, defines 'parenthesis' as under:

'Parenthesis.—a parenthesis is defined to be an explanatory or qualifying clause, sentence, or paragraph, inserted in another sentence, or in course of a longer passage, without being grammatically connected with it. (Cent. Dist.)

Parenthesis is used to limit, qualify or restrict the meaning of the sentence with which it is connected, and it may be designated by the use of commas, or by a dash, or by curved lines or brackets (*United States v. Schilling* [53 Fed 81 ; 3 CCA 440]).'

52. Having regard to the grammatical use of brackets or parentheses, if the words, '(and from no others)' occurring in [section 39](#) of the 1940 Act or [section 37](#) of the 1996 Act are viewed as 'an explanation or afterthought' or extra information separate from the main context, then, there may be some substance in Mr. Dave's submission that the words in parenthesis are surplusage and in essence the provisions of [section 39](#) of the 1940 Act or [section 37](#) of the 1996 Act are the same as [section 50](#) of the 1996 Act. [Section 39](#) of the 1940 Act says no more and no less than what is stipulated in [section 50](#) of the 1996 Act. But there may be a different reason to contend that [section 39](#) of the 1940 Act or its equivalent [section 37](#) of the 1996 Act are fundamentally different from [section 50](#) of the 1996 Act and hence, the decisions rendered under [section 39](#) of the 1940 Act may not have any application to the facts arising under [section 50](#) of the 1996 Act. But for that we need to take a look at the basic scheme of the 1996 Act and its relevant provisions."

27. At this point, another decision of the Supreme Court in the case of **Dozco India Private Limited v. Doosan Infracore Company Ltd.**¹² may also be taken note of in which the question was of interpreting the arbitration agreement between the parties. The Supreme Court set out the clause being interpreted in paragraph 4 of the aforesaid decision which reads as under: -

"4. The petition is countered on behalf of the respondent who opposes the same on account of maintainability. According to the respondent, only the rules of arbitration of the International Chamber of Commerce would apply in accordance with the agreement between the parties. It is contended by the respondent that this Court will have no jurisdiction much less under [Section 11\(6\)](#) of the Act to appoint arbitrator, particularly, because it has been specifically agreed in [articles 22](#) and [23](#) which are as under :

'[Article 22. Governing Laws.](#)—22.1 : This agreement shall be governed by and construed in accordance with the laws of The Republic of Korea.

[Article 23. Arbitration.](#)—23.1 : All disputes arising in

connection with this agreement shall be finally settled by arbitration in Seoul, Korea (or such other place as the parties may agree in writing), pursuant to the rules of agreement then in force of the International Chamber of Commerce'."

28. The Supreme Court while interpreting the words in the brackets appearing in Article 23.1 opined in paragraph 15 as under: -

"15. If we see the language of [article 23.1](#) in the light of [article 22.1](#), it is clear that the parties had agreed that the disputes arising out of the agreement between them would be finally settled by the arbitration in Seoul, Korea. Not only that, but the rules of arbitration to be made applicable were the Rules of the International Chamber of Commerce. This gives the prima facie impression that the seat of arbitration was only in Seoul, South Korea. However, Ms. Mohana, learned counsel appearing on behalf of the petitioner drew our attention to the bracketed portion and contended that because of the bracketed portion which is to the effect 'or such other place as the parties may agree in writing', the seat could be elsewhere also. It is based on this that Ms. Mohana contended that, therefore, there is no express exclusion of Part I of the Act. It is not possible to accept this contention for the simple reason that a bracket could not be allowed to control the main clause. The bracketed portion is only for the purposes of further explanation. In my opinion, Shri Gurukrishna Kumar, learned counsel appearing on behalf of the respondent, is right in contending that the bracketed portion is meant only for the convenience of the Arbitral Tribunal and/or the parties for conducting the proceedings of the arbitration, but the bracketed portion does not, in any manner, change the seat of arbitration, which is only Seoul, Korea. The language is clearly indicative of the express exclusion of Part I of the Act. If there is such exclusion, then the law laid down in [Bhatia International v. Bulk Trading S.A.](#)¹³ must apply holding (SCC page 123, para 32) :

'32. ... In cases of international commercial arbitrations held out of India provisions of Part I would apply unless the parties by agreement, express or implied, exclude all or any of its provisions. In that case the laws or rules chosen by the parties would prevail. Any provision, in Part I, which is contrary to or excluded by that law

or rules will not apply'."

29. From the above-stated clear pronouncement of the Supreme Court in aforesaid two judgments, it is quite vivid that the utility of a bracket is only as an illustration, explanation or extra information. It is thus clarificatory. It is not always exhaustive of the terms outside the bracket. It cannot curtail or limit the scope of the terms outside the bracket. The Supreme Court in the aforesaid judgments has clearly held that ordinarily, words appearing in brackets are illustrative and not exhaustive. Therefore, everything would depend upon the context and purpose with which in an individual statute the words in the bracket are inserted by the appropriate Legislature.
30. The above-stated two judgments of the Supreme Court interpreting the meaning of word mentioned in parenthesis has been followed recently by the Bombay High Court in the matter of **Zamil Steel Buildings India Pvt. Ltd. and another v. State of Maharashtra**¹⁴.
31. Reverting to the facts of the present case, it is quite vivid that it has been held herein-above by the Supreme Court also while dealing with the question whether bitumen emulsion is covered within Entry 22 of Part A of Schedule II to the U.P. Value Added Tax Act, 2008, which only refers to bitumen that bitumen includes bitumen emulsion. It has also been held that the words inside the brackets i.e. coal-tar in front of bitumen would not control the meaning of the words outside the bracket and it would not curtail or limit the

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scope of the words employed outside the bracket. The word bitumen is also known as commercially, coal-tar as such, the word coal-tar in brackets in front of bitumen is only clarificatory in nature and would not control the meaning and scope of the word bitumen in Entry-23 under Part II of Schedule-II of the VAT Act.

32. It was the duty on the part of the State / Revenue to bring strong evidence on record to establish the fact that a particular commodity will not fall within Entry-23 under Part II of Schedule-II of the VAT Act and would only fall under the residuary entry. A focused perusal of the record would show that no material much less reliable evidence has been brought on record to hold that bitumen emulsion would not fall within Entry-23 under Part II of Schedule-II of the VAT Act and the word coal-tar would control the meaning of the word bitumen as used in the said entry which was incumbent on the part of the assessing authority. The assessing authority simply relying upon the decision of the M.P. High Court in **Tiki Enterprises** (supra) has held that bitumen emulsion would not fall within the meaning of Entry-23 under Part II of Schedule-II of the VAT Act and residuary article would apply ignoring the fact that after the decision in **Tiki Enterprises** (supra), the Supreme Court in **A.R. Thermosets Private Limited's** case (supra) while considering similar issue with reference to the U.P. Value Added Tax Act, 2008, has clearly held that bitumen emulsion is covered by the charging entry whereas the U.P. Value Added Tax Act, 2008, refers only to bitumen. The Revenue ought to have brought clear cut reliable evidence to hold that bitumen is not covered by the

said entry. In my considered opinion, bitumen emulsion is bitumen for all practical purposes as held by the Supreme Court in A.R. Thermosets Private Limited's case (supra) and the word coal-tar inside the brackets in front of the word bitumen in Entry-23 under Part II of Schedule-II of the VAT Act is only clarificatory in nature, as the word bitumen is commercially and commonly known as coal-tar and would not control or qualify the meaning of word bitumen in the said entry. The subsequent insertion of bitumen emulsion in Entry-23 under Part II of Schedule-II of the VAT Act with effect from 1-6-2013 is of no consequence.

33. As a fallout and consequence of the aforesaid discussion, the order passed by the assessing authority as affirmed by the appellate authority and the revisional authority holding that bitumen is not covered by Entry-23 of Part II of Schedule-II of the VAT Act, is hereby set aside. Consequently, it is held that bitumen emulsion is covered by Entry-23 of Part II of Schedule-II of the VAT Act and rate of VAT would be 4% or applicable rate as per notification.

34. The writ petitions are allowed to the extent outlined herein-above.
No order as to cost(s).

Sd/-
(Sanjay K. Agrawal)
Judge