PROCEEDINGS OF ADVANCE RULING AUTHORITY UNDER SECTION 55 OF THE MVAT ACT 2002 AND UNDER RULE 63 OF THE MVAT RULES, 2005

1.	Name of the Applicant	**Borsad Tobacco Co. Pvt. Ltd.**
2.	Address	Nirmal , 21st Floor, Nariman Point, Mumbai – 400021.
3.	TIN	27635222033V
4.	Details of Application	ARA No.164 dated 29.11.2017
5.	Jurisdictional Assessing Authority	THA-VAT-E-003 and AC(D-002), Investigation, Thane
6.	Heard	Mr. Vinayak P. Patkar, **(Advocate)** and Mr. Mahapatra **(C.F.O.)**
7.	E-mail	incometax@sopariwala.com
8.	Advance Ruling Authority	Shri. C. M. Kamble **(Chairman)**, V.V. Kulkarni **(Member)**, A.A. Chahure **(Member)**.

ORDER NO.ARA164/2017-18/Disp. Reg. No. 36 **Dated** 16/03/2018

(Order under Section 55(5) and 55(9) of the MVAT Act, 2002)

The applicant, M/s. Borsad Tobacco Co. Pvt. Ltd. has applied for determination of rate of tax on **"Shaheen Misri"** under section 55 of MVAT ACT, 2002. The applicant has informed that the investigation unit visited the place of business of applicant and had asked to discharge the tax liability. Hence, he has applied for Advance Ruling.

02. Fact of case:-

Mr. Vinayak P. Patkar (Advocate) along with Mr. Mahapatra **(C.F.O.)** attended and briefed the case. The applicant produces and does marketing of the impugned goods. The applicant has shown samples of the products to the authority and submitted the related documents. He has informed the nature of the product and its description. The relevant facts leading to the application are set out as under.

2.1 **The applicant has informed** that the product manufactured and distributed by the applicant is Shaheen-Misri. The 'Dust' and 'Rava' of tobacco is used for

manufacturing of the product. It is submitted that the Masheri is roasted or burnt powdered tobacco. It is applied on teeth and gums due to addiction of Nicotine. It is commonly used as tooth powder. The addiction of this product leads to number of diseases especially oral cancer, gum disease, etc.

2.2 The 'Shahin Bhajki Masheri' is known in the market as tooth powder for cleaning the teeth. He has relied on the judgement dated 06/07/2011 passed by the Customs, Excise and Service Tax Appellate Tribunal, West Zonal Branch at Ahmedabad and judgement of the Supreme Court dated 08/03/2016 in Civil Appeal No.3207 of 2006. Further he stated that the Hon. Supreme court of India had held the product as tooth powder covered under Chapter Heading 3306.10 as against Chapter Heading no.2204.99 which is for tobacco product. The apex court in clear terms held that the product is tooth powder and not the Tobacco product.

2.3 Mr. Vinayak P. Patkar, (Advocate) stated that the Court followed its own judgement in the case of M/s Global Impex v/s Union of India and the judgement in the case of Baidyanath Ayurved Bhavan Ltd,2009(12) SCC 419.The Court has applied the common parlance test and has held the product as a tooth powder. Kindly note, the common parlance test is independent of the revenue laws. The entries under the different enactments may be different. However, that entry is to be applied which the common man understands to cover the product.

2.4 **Mr. Vinayak P. Patkar,** (Advocate) Stated that Under the MVAT Act, 2002 the tooth powder is covered by the Entry.No.E-01. Therefore, the Shahin Bhajki Masheri is required to be held as tooth powder even under the MVAT Act, 2002.

2.5 **Mr. Vinayak P. Patkar,** (Advocate) contended that even otherwise if an article is to be taxed and may fall within two different entries, the entry which is more beneficial to the assesse will have to be accepted as applicable to the article in question. See Bharat Vijay Mills, 85 STC 23 (Kar).

2.6 It is submitted that Hon. Apex court in the appellant's case held that it is tooth powder with provision made under Excise Act.

2.7 In nutshell, it is argued that the Common Parlance and Trade Parlance, both are in favour of the appellant. The Supreme Court has in clear terms held the product as Toothpowder. The entry is the recent one and has not been interpreted by any Court or Tribunal under the MVAT Act, 2002. The appellant did not have this benefit. The appellant has collected the VAT as specified under entry E-1.The returns were filed accordingly and the self assessment report was also filed classifying the product under entry No.E-1. However, the Department did not object to the same prior to the visit of the Investigation Department. The product has the medicinal uses for dental disorders and the same is being used by the poor people for such uses. The appellant is entitled to the beneficial interpretation.

2.8 The prospective Effect:-

With this submission, the Mr. Vinayak Patkar, Advocate stated that the Product **'Shahin Masheri'** to be held as covered by the Entry E-1 Of the MVAT Act, 2002. However, in the event of adverse decision, the appellant prays that prospective effect may please be granted to the ARA Ruling.

<u>03. The legal position, Analysis and discussion:-</u>

On this background, it would be worthwhile to have a closer look at the statutory provisions under the MVAT Act, 2002 and relevant schedule entry under the Act.

3.1 The charging Section- 6: Levy of sales tax on the goods specified in the Schedules:-

> *(1) There shall be levied a sales tax* ***on the turnover of sales of goods*** *specified in column (2) in Schedule B, C, D or, as the case may be, E, at the rates set out against each of them in column (3) of the respective Schedule.*

Thus, section-6 of MVAT Act provides that the tax is to be levied on commodity which is sold. In fact, the dealer liable to pay tax, should discharge the tax liability as per the charging section.

3.2 The scheme of levy of tax as per provided schedule.

For the purpose of determination of rate of tax on particular commodity MVAT ACT,2002 provides Five schedules namely, A,B,C,D and E. The rate of tax indicates that tax on goods to which the entry relates shall be charged on the basis of the sale price, the tax being equal to such percentage of the sale price as is indicated against the respective entry under which the goods fall in that schedule. The classification of goods as per schedule is as under.

Sr. No.	Schedule	Goods covered are taxable at the rate of
1	A	NIL %
2	B	1%, 1.1% o r 1.2%
3	C	Between 2% to 5.5 % (including both)
4	D	4 % ,5% and 20 % or above
5	E	Goods not covered elsewhere for which the rat e of tax is 12.50 %

On analysis of the scheme of schedules appended to MVAT ACT, 2002, it is observed that the **FIVE schedules are prepared to classify** goods for determination of rate of tax on particular commodity. First, we have to see whether goods can be classified in first four **schedules (A,B,C and D)** and when it is concluded that the goods does not fall under first four schedule then only resort of residuary entry provided in **schedule-E** must be considered.

3.3 The schedule entries for tobacco and tobacco products:-

In this context we have to study the schedule entry related to tobacco and tobacco product under MVAT ACT, 2002.The possible schedule entry to classify the **tobacco**

and its products are enumerated as under. These schedule entries are amended time to time.

Sr. No.	Name of the commodity		Rate of Tax	with effect from
(1)	(2)	(3)	(4)	(5)
A-45	Sugar, fabrics and tobacco as described, from time to time, in column (3) of the First Schedule to the Additional Duties of Excise (Goods of Special Importance), Act, 1957(58 of 1957).		Nil %	1.4.2005 to 31.1.2006
A-45	Sugar, fabrics and tobacco as described, from time to time, in column (3) of the First Schedule to the Additional Duties of Excise (Goods of Special Importance), Act, 1957(58 of 1957).		Nil %	1.2.2006 to 31.3.2007
	Explanation : For removal of doubts, it is hereby declared that tobacco shall not include Pan masala, that is to say, any preparation containing betel nuts and tobacco and any one or more of the following ingredients, namely:-			
	(i) lime; and			
	(ii) Kattha (catechu),			
	whether or not containing any other ingredients such as cardamom, copra and menthol.			
A-45	Sugar and fabrics as described from time to time in column (3) of the First Schedule to the Additional Duties of Excise [Goods of Special Importance], Act,1957 (58 of 1957).	-	Nil %	1.4.2007 to 31.3.2010
A-45	Sugar and fabrics as described from time to time in column (3) of the First Schedule to the Additional Duties of Excise [Goods of Special Importance], Act, 1957 (58 of 1957) but excluding those specified in schedule 'C'.	-	Nil %	1.4.2010 to 7.4.2011

A-45	Sugar and fabrics as described from time to time in column (3) of the First Schedule to the Additional Duties of Excise [Goods of Special Importance], Act, 1957 (58 of 1957) as it stood prior to the date on which the Finance Act, 2011 comes into force, but excluding those specified in schedule 'C'.	-	Nil %	8.4.2011 to date
45A	(a)unmanufactured tobacco covered under Tariff Heading No. 2401 of the Central Excise Tariff Act, 1985 (5 of 1986)	-	Nil %	1.4.2007 to 31.3.2012
	(b)biris covered under tariff item No. 24031031, 24031039, of the Central Excise Tariff Act, 1985 (5 of 1986).	The Central Excise Tariff Item No. 24031090 has been deleted by Corrig. Dated 09.07.2007		
45A	(a) unmanufactured tobacco covered under Tariff Heading No. 2401 of the Central Excise Tariff Act, 1985 (5 of 1986);	-	Nil %	1.4.2012 to **31.3.2013**
	(b) deleted w.e.f. 1.4.2012			
	"Explanation-For the removal of the doubts, it is hereby declared that the unmanufactured tobacco shall not include unmanufactured tobacco when sold in packets under the Brand name."			
45A	**(deleted)**	-		**w.e.f. 1.4.2013.**
D-12	Tobacco, manufactured tobacco and products thereof including cigar and cigarettes but excluding those to which entry 45A of SCHEDULE A and Entry 101 of SCHEDULE C applies.		20%	1.7.2009 to 31.3.2012
D-12	Tobacco, manufactured tobacco and products thereof including cigar and cigarettes but excluding Beedi and those to which entry 45 A of SCHEDULE A applies.		20%	1.4.2012 to 30.4.2012

D-12	Tobacco, manufactured tobacco and products there of including cigar and cigarettes but excluding, •Unmanufactured tobacco when sold in packets under brand name and; •those to which entry 45A of SCHEDULE A , and sub-entry (b) of 12 of SCHEDULE C applies.		20%	**1.5.2012 to 31.3.2013**
D-12	**Tobacco, manufactured tobacco and products thereof but excluding,- (a) Beedi and unmanufactured tobacco whether sold under brand name or not; (b) Cigar and cigarettes to which entry 14 of this Schedule applies.**		**20%**	**1.4.2013 to date**
D-14	**Cigar and cigarettes.**		**35%**	**1.10.2015 to date**
E-1	**All goods not covered in any of the other schedules**		**12.50%**	**1.4.2005 to till date**

We have to see the scheme of classification of the impugned product under MVAT ACT, 2002. On analysis of all schedule entries, it is revealed that the tobacco and tobacco products are classified as unmanufactured tobacco, manufactured tobacco and different products of tobacco in different entries as shown in above table. Further it is seen that out of tobacco products cigar and cigarettes are subjected to higher rate of tax equal to 35 percent.

With this discussion, we found most relevant schedule entry D-12 for the purpose of classification. On analysis of this schedule entry, it is seen that the manufactured tobacco products excluding cigar and cigarettes are grouped under this schedule entry. Thus, tobacco products are classified under two schedule entry appended to D schedule i.e. D-12 and D-14. Now, it is necessary to see whether the impugned product is classified in schedule entry D-12 or otherwise.

The term manufactured tobacco is important to decide the impugned product is manufactured tobacco products or otherwise:-

The Section 2(15) of the MVAT ACT, 2002 throws light on concept of manufacturing.

"manufacture", with all its grammatical variations and cognate expressions includes producing, making, extracting, altering, ornamenting, finishing or otherwise processing, treating or adapting any goods.

The Masheri is roasted or burnt powdered tobacco. The salt is added to the tobacco and it is burnt and packed. **In common parlance, it is understood in its popular sense, and in conversant with the class of people uses it as tooth powder. There is no doubt that it is the product of tobacco.** It is applied on gum for consumption of Nicotine . It is also to be noted that for the purpose of MVAT ACT, 2002 the schedule entry provided was A-45A- as Unmanufactured tobacco covered by Tariff heading 2401for earlier periods. The appellant has stated that the Hon. Apex court held that the product is tooth powder and covered by the Excise heading 3306. So the product is manufactured tobacco product. Hence the masher is manufactured tobacco product

4.2 Test of common parlance:-

We have dealt with the term "Tobacco product" provided in the schedule entry D-12.The conforming term tobacco product is not defined under MVAT ACT, 2002. Since we are dealing with Sales Tax Statute, it is necessary to refer the principles laid by various court authorities to interpret the schedule entry under that statute. Under the sales tax statutes, **it is a well-settled proposition** that such expressions occurring in sales tax enactments must be understood in their popular sense, that is in the sense in which "people conversant with the subject-matter with which the statute is dealing would attribute to it".

4.3 Under these circumstances, we would like to cite and refer the judgment of various court authorities as under.

a) The Hon. Supreme Court in the case of State of U.P. VS. Kores (INDIA) LTD. reported in STC V.39 PAGE 8 has held as under:

> "It is well settled that a word which is not defined in an enactment has to be understood in its popular and commercial sense with reference to the context in which it occurs."

b)The Hon. Supreme Court in the case of Ram Avtar Budhai Prasad Versus Assistant Sales Tax Officer, 12 STC 286 held that the word "vegetable' in Schedule of C.P. and Berar Sales Tax Act must be construed not in any technical sense nor from botanical point of view but as understood in common parlance.

c) A classic example on the concept of common parlance is the decision of the Exchequer Court of Canada in R. v. Planters Nut and Chocolate Co. Ltd. [1951 CLR 122 (Can)]. The question involved in the said decision was whether salted peanuts and cashew nuts could be considered to be "fruit" or "vegetable" within the meaning of the Excise Tax Act. Cameron, J., delivering the judgment, posed the question as follows:

> "... Would a householder when asked to bring home fruits or vegetables for the evening meal bring home salted peanuts, cashew or nuts of any sort? The answer is obviously 'no'." Applying the test, the Court held that the words "fruit" and "vegetable" are not defined in the Act or any of the Acts in pari materia. They are ordinary words in everyday use and are therefore, to be construed according to their popular sense.

d) The analogous view is taken by Hon. Apex court and various High courts in number of cases regarding application of common parlance test for interpretation of schedule entry when the terms are not specifically defined under those Acts. For ready reference we would like to cite some cases. **Indian Cable** Co. Ltd. v. Collector of Central Excise, (1994) 6 SCC 610, **Trutuf Safety Glass** Industries [2007] 8 VST 661 (SC), **Ganesh Trading** Co.,(1973) 32 STC 623 SC, **RK. Rim Pvt**. Ltd. versus Commissioner of Sales Tax, Mumbai and another: (2010) 30 VST 435 (Bom.), **Raman Boards** Ltd versus State of Karnataka, 2015 (3) TMI 1048 (Kar.) **The larger**

bench of Apex court in the case of Indo International Industries, 2002-TIOL-333-SC-CT.

The various court decision pertain to sales tax laws lessons that in the absence of a statutory definition in precise terms; words, entries and items in taxing statutes must be construed in terms of their commercial or trade understanding, or according to their popular meaning. In other words, they have to be construed in the sense that the people conversant with the subject matter of the statute, would attribute to it. Resort to rigid interpretation in terms of scientific and technical meanings should be avoided in such circumstances. It is needless to say that this would not apply when the Legislature has expressed a contrary intention such as by providing a statutory definition of the particular entry, word or item in specific, scientific or technical terms. In that event, the interpretation ought to be in accordance with the statutory definition or meaning and not according to common parlance understanding. Hence, the test of common parlance is applied.

With this analogy, the nature of impugned product, **Masheri** is roasted or burnt powdered tobacco with addition of salt is prepared from tobacco. It is applied on teeth and gums due to addiction of Nicotine. It is commonly used as tooth powder. In common parlance it is identified as tobacco product and is advertised accordingly. Even Hon. Apex court in the appellant case held that it is tooth powder and classified **under CETH No.3306.10**. Now, to deal with contention of applicant two schedule entries provided under MVAT ACT, 2002 are required to be considered for the purpose of classification of impugned product.

I) The Schedule entry D-12:-

Tobacco, manufactured tobacco and products thereof but excluding,-
(a) Beedi and unmanufactured tobacco whether sold under brand name or not;
(b) Cigar and cigarettes to which entry 14 of this Schedule applies.

II) As per contention of applicant, the Hon. Apex court held that the product is tooth powder and covered by the Excise heading 3306; hence it should be classified under schedule entry E-1.

The schedule entry read as-

E-1:- All goods not covered in any of the other schedules

On analysis of both entries, we found that the schedule entry D-12 is most specific related to tobacco and tobacco products. The another entry is residuary entry, and it is settled principle the resort of residuary entry shall be considered when **the goods not covered in any of the other schedules namely Schedule-A, B, C and D of MVAT ACT, 2002. The Hon. Apex court and various High courts have laid dawn the principle that in taxing statute, the specific schedule entry overrules general schedule entry. In this regard, we would like to refer to some case laws.**

4.4 THE SPECIFIC ENTRY OVERRULES GENERAL ENTRY:-

a) The Hon. Supreme Court in the case of the State of Maharashtra Vs. Bradma of India Ltd. (2005) 2 SCC 669 : [2005] 140 STC 17 has held that a specific Entry in the schedule to a taxing statute would override a general Entry. Resort has to be had to the residuary or general Entry only when a liberal construction of the specific Entry cannot cover the goods in question.

> 7.. We are of the opinion that the High Court was wrong. Both the Tribunal and the High Court commonly enunciated the principle that a specific entry would override a general entry. In addition we would add, and as has been held in Collector of Central Excise v. Wood Craft Products Ltd. (1995) 3 SCC 454, 462, resort has to be had to the residuary heading only when a liberal construction by the specific heading cannot cover the goods in question.

b) The Hon Bombay High Court in the case of M/s Kirloskar Oil Engines Ltd. Versus The Commissioner of Sales Tax Maharashtra came across with classification of bearing and held that As far as the bearings are concerned, there is special Entry which deals with bearings of all types including Ball or Roller bearings. This Entry is Schedule Entry C-II-146. There being a specific / special Entry for bearings (Entry C-II-146), it is not correct to hold that the bearings sold by the applicant would fall either under Entry C-II-102(2) [as a components, parts of a motor vehicle] or under Entry

C-II-135 read with the Notification Entry A-35 [as a components and/or parts of tractors specifically designed for agricultural use] - When there is a specific Entry in the schedule to a Taxing Statute, the same would override a general Entry.

15. We are unable to agree with the submissions of the applicant on this point. As far as the bearings are concerned, there is special Entry which deals with bearings of all types including Ball or Roller bearings. This Entry is Schedule Entry C-II-146. There being a specific / special Entry for bearings (Entry C-II-146), we are unable to hold that the bearings sold by the applicant would fall either under Entry C-II-102(2) [as a components, parts of a motor vehicle] or under Entry C-II-135 read with the Notification Entry A-35 [as a components and/or parts of tractors specifically designed for agricultural use]. When there is a specific Entry in the schedule to a Taxing Statute, the same would override a general Entry. In fact, resort should be taken to the general Entry only when a liberal construction of the specific Entry would not cover the goods in question. As far as bearings sold by the applicant are concerned, it can hardly be disputed that Entry C-II-102(2) and C-II-135 read with the Notification Entry A-35 would be general entries in comparison to Entry C-II-146 which specifically deals with all types of bearings.

c) Hon. Allahabad High Court in the case of Hindustan Lever Limited Versus The Commissioner Of Trade Tax, Lucknow And Another,2014 (1) TMI 723 ,, [2014] 69 VST 151 (All) came across with specific entry and general entry for the classification of Chicory Roots. It is held that the Chicory Roots are specifically mentioned in the Notification dated 29.1.2001 while the Notification dated 31.1.1985 as amended by Notification No. 595 dated 10.4.1999 contain a general entry with respect to fresh roots. It is well settled that a special provision shall prevail over a general provision. When the Chicory Roots are specifically covered by independent Notification dated 29.1.2001, the contention that it shall be covered by general entry mentioned in any other Notification is not correct.

5. So far as second question is concerned, it is not in dispute that Chicory Roots are specifically mentioned in the Notification dated 29.1.2001 while the

Notification dated 31.1.1985 as amended by Notification No. 595 dated 10.4.1999 contain a general entry with respect to fresh roots. It is well settled that a special provision shall prevail over a general provision. When the Chicory Roots are specifically covered by independent Notification dated 29.1.2001, the contention that it shall be covered by general entry mentioned in any other Notification is not correct. This question, therefore, is answered accordingly.

Thus, it is safely concluded that the specific schedule entry overrules general schedule entry.

05 The legal submission of applicant:-

The Applicant has relied on the decision of Hon. Apex court judgment in own case which is related to Excise Act. The issue involved was whether the product is classified in CETH 3306 or otherwise. The apex court has applied common parlance test and since the impugned product is used as tooth powder has ruled that it falls under chapter 33 of Excise Act. On similar chronology the appellant tried to persuade that the impugned products are held as tooth powder in Excise Act and hence they are covered by E-1 of MVAT ACT, 2002.

On the backdrop of discussion held hereinabove, the contention, legal submission and arguments advanced by Ld. Advocate requires consideration. Hence, it is worthy to refer the provisions under MVAT ACT, 2002 and principles laid down by various court authorities to interpret the schedule entry under sales tax statutes. Hence, it is necessary to see whether decisions under Excise Act are squarely applicable to MVAT ACT or otherwise.

5.1 Whether decisions of court authorities under Excise Act when decided on the basis of <u>provisions</u> under the said act are squarely applicable to schedule entry under MVAT Act under the absence of said <u>provisions</u>?:-

a) The Applicant has mostly relied on the decision of court authorities related to Excise Act. The applicant specifically relied on Hon. Apex Court judgment in case of Borsad. Hence, it is necessary to observe microscopically the ratio of Apex court judgment.

b) The Hon. Supreme Court in the case of Borsad Tobacco [Civil Appeal No. 3207 of 2006] came across the classification products under chapter 24 or 33 for levy of Excise duty. The Hon Apex court has relied on the own judgment in the case of Commissioner of Central Excise Versus Shree Baidyanath Ayurved Bhawan Ltd. And vice versa, 2009 (4) TMI 6 - SC

The issue involved was whether the product is classified in CETH 3306 or otherwise.

The apex court has applied common parlance test and since the impugned product is used as tooth powder has ruled that it falls under chapter 33 of Excise Act. In the case of Baidyanath, the entries related to Chapter 30 and 33 of Excise Act were interpreted for classification of different products. The Apex court has considered the specific terms medicament and cosmetics, chapter Heading and notification provided under Excise Act. The Apex court observed that----

> **38.** We endorse the view that in order to determine whether a product is covered by 'cosmetics' or 'medicaments' or in other words whether a product falls under Chapter 30 or Chapter 33 : twin test noticed in Puma Ayurvedic Herbal (P) Ltd., continue to be relevant. The primary object of the Excise Act is to raise revenue for which various products are differently classified in New Tariff Act. Resort should, in the circumstances, be had to popular meaning and understanding attached to such products by those using the product and not to be had to the scientific and technical meaning of the terms and expressions used. The approach of the consumer or user towards the product, thus, assumes significance. What is important to be seen is how the consumer looks at a product and what is his perception in respect of such product. The user's understanding is a strong factor in determination of classification of the products. We find it difficult to accept the contention of the learned senior counsel for Baidyanath that because DML is manufactured exclusively in accordance with the formulae described in Ayurveda Sar Sangrah which is authoritative text on Ayurvedic system of treatment and is notified in the First Schedule to the Drugs and Cosmetics Act, 1940 and the said product is sold under the name 'Dant Manjan Lal' which is the name specified for the said product in Ayurveda Sar Sangrah, the common parlance test is not applicable. As a matter of fact, this contention is based on misplaced assumption that Chapter Sub-heading 3003.31

by itself provides the definition of Ayurvedic Medicine and there is no requirement to look beyond.

c) We have gone through the judgments and found that the various court authorities had considered the provisions under Excise Act (such as, meaning of medicaments, cosmetics as per relevant act, the Tariff headings related to chapter 30,33,34 of Excise Act, the notes appended to these chapters which describes coverage of goods or otherwise, packing, labeling of the products, the various defined terms as per Excise Act etc.) and classified or interpreted the nature of impugned products as medicaments or otherwise for the purpose of Excise Act. Under the Excise Act, the term medicament for Ayurvedic medicines and cosmetics are referred to different chapters. Under Excise Act, the Ayurvedic medicines are decided on the test of **"whether ingredients used in the product mentioned in the authoritative textbooks on Ayurveda?"** The circulars and notifications are issued for the said purpose. The products are classified on the basis of Tariff Headings, notes appended to chapters and circulars and notification issued for the said products.

Thus, it is summarized that the Hon. Apex court has relied on the specific **provisions** of Excise Act, and interpreted the nature of product. **The Apex Court has not preferred to apply the common parlance test as the term medicaments and cosmetics are specified in Excise Act.**

It is relevant to note that such type of provisions are not provided in the MVAT ACT, 2002. We do not find these terms defined under the MVAT ACT. We have dealt the **provisions** and the schedule entry for "specific Schedule entry" under MVAT ACT,2002 at length. **It is observed that the provisions and descriptions of Excise Act and MVAT ACT in relation to impugned commodity are not pari materia.** Hence the test of common parlance is significant to decide the issue. The term tooth powder is not specifically classified in the schedules appended to MVAT ACT, 2002.Hence there is no relevancy to consider it when specific entry D-12 of MVAT ACT, 2002 is very well available for the interpretation. **We could not put a yard scale and apply the same principles for both Acts (Excise Act and MVAT Act).** Hence, the decision of court authorities given under Excise ACT is not squarely

applicable to MVAT ACT. This view is fortified with the observation of Apex court in the case of Hindustan Lever and Falcon Tyres.

d) The Hon. Supreme Court of India in Hindustan Lever Ltd vs State Of Karnataka C. A. No.4003 of 2007 decided on 2 September, 2016 has considered the provisions of different acts and decided that when the provisions are different then context of the Entry Tax Act is most important and that decisions relatable to the Central Excise Act and to Sales Tax statutes would not therefore apply. Further, held that

> 14. Equally, the argument based on Section 5A of the Karnataka Sales Tax Act is fallacious in that it is only for the purpose of "industrial inputs" that packing materials are included, and forms a separate scheme of taxation under the Sales Tax statute. We cannot accede to the argument that de hors the context of the Entry Tax Act, we should accept that industrial inputs include packing materials and that therefore, by parity of reasoning, "inputs" under the Entry Tax Act should also include packing material. This argument has therefore correctly been turned down by the High Court of Karnataka in the Nestle case.

e)The Hon. Apex court in the case of Falcon Tyres Ltd. Versus State of Karnataka and others 2006 (7) TMI 316has come across the meanings employed in other acts would be relevant or otherwise. It is held that-

> The learned counsel for the appellant relied upon Karnataka Forest Development Corporation Ltd. V. Cantreads Pvt. Ltd. [1994] 4 SCC 455, to contend that rubber is an agricultural produce. This was a case under the Karnataka Forest Act, 1963 for the purposes of levy of the forest development tax. The meaning assigned to the agricultural produce in the present Act is different from what was assigned to it in the Karnataka Forest Act, 1963. The same is not relevant. Similarly, he cited two other judgments which are not germane to the point and need not even be noticed. The Legislature has deliberately excluded certain items from being agricultural produce and therefore while interpreting the provisions of the present Act, the legislative intention will have to be given effect to in consonance with the definition as contained in the statute.

Thus, the meaning assigned to the agricultural produce in the present Act is different from what was assigned to it in the Karnataka Forest Act, 1963. The same is not relevant.

When the provisions are different, then context of the Act in which we are dealing is most important and that decisions relatable to the other statutes would not therefore apply. There is no justification in importing the terms for the purpose of interpretation.

f) The Applicant is buying tobacco dust and manufactures the impugned product. The Tooth powder is a distinct and different commercial commodity prepared from tobacco dust/ rawa. We have gone through the Apex court judgment in the case of Global impex.

The issue involved was whether the impugned product is tooth powder and falls in CETH No. 3306 or otherwise. The Apex court has held that in common parlance the impugned product is used as tooth powder and fall under CETH NO. 3306. It is relevant to note that under excise classification all the dentifrices are classified under CETH NO. 3306. To have clarity the said heading is reproduced as under.

PREPARATIONS FOR ORAL OR DENTAL HYGIENE, INCLUDING DENTURE FIXATIVE PASTES AND POWDERS; YARN USED TO CLEAN BETWEEN THE TEETH (DENTAL FLOSS), IN INDIVIDUAL RETAIL PACKAGES:-

330610	-	Dentifrices:		
33061010	---	In powder	kg.	12.5%
33061020	---	In paste	kg.	12.5%
33061090	---	Other	kg.	12.5%.

Thus, it is clear that under Excise law, the dentifrices are specially classified and grouped under CETH NO. 3306. We do not find such classification under schedule appended to MVAT ACT, 2002.

g) However, the tobacco and their products are classified under Schedule entry D-12 of MVAT ACT. There is a transformation of a new commodity commercially known as distinct and separate commodity namely Masheri used as tooth powder and thus having its own character, use and name. Be it the result of one process or

several processes in fact ' manufacture' had taken place. There is no doubt that the impugned product is product of Tobacco. Moreover, it is keenly observed that the warning **"injurious to Health"** is advertised on the use of product. **We have already seen that the specific entry overrules general entry. Under MVAT ACT, 2002 the product related to tobacco is classified according to class of good as tobacco product. Since specific schedule entry (class of goods) is available under MVAT ACT, 2002, the impugned product is to be classified in that entry only. Hence, we respectfully opined that the ratio of Hon. Apex Court judgment set on different facts is not squarely applicable to case in hand. The applicant has stated that the impugned product being tooth powder is to be covered by residuary entry cannot be allowed when the specific entry D-12 available for classification of goods.**

h) Moreover, for academic purpose, it is also seen that the product is covered by The Cigarettes and Other Tobacco Products (Prohibition of Advertisement and Regulation of Trade and Commerce, Production, Supply and Distribution) Act, 2003 or COPTA -2003. As per the provisions of COPTA the product is not to be used by children below 18 years unlike in case of normal tooth powder. As per the provisions of COPTA the warning message that the product is injurious to heath has to be printed on the packing of the product unlike normal tooth powder.

5.2 Mr. Patkar, Advocate relied on the judgment in case of Bharat Vijay Mills, 85 STC 23 (Kar) and argued that if an article is to be taxed and may fall within two different entries, the entry which is more beneficial to the assessee will have to be accepted as applicable to the article in question.

We have gone through the judgment. The issue involved was "whether sintex water drums fall within entry 118 of the Second Schedule (containers other than gunnies) or falls under entry 110 that is articles made of polythene " i.e. two specific entries.

As discussed above, it is settled principle for applicability of specific entry or residuary entry that **"only such goods as cannot be brought under the various specific entries in the schedules should be attempted to be brought under the residuary entry".**

In present case, there is specific entry applicable to tobacco products so the ratio of judgments relied upon is not applicable.

8. **The prospective effect:-**

Mr. Patkar, Advocate stated that if Authority arrived to different opinion, and it is held that product is not covered by the said schedule entry relied by applicant, then benefit provided in section 55(9) shall be given to him and prospective effect to Advance Ruling order is to be given. He argued that due to judgments as indicated above, there is fluid legal position. If any higher rate is decided for past period, it will create heavy financial burden upon the applicant and its viability will be affected. Therefore considering above facts and circumstances, the protection be given by making the ruling prospective from the date of pronouncement and oblige.

Further, he requested to grant benefit provided in section 55(9) of MVAT ACT, 2002. He has not submitted any supportive evidences so as to grant him the prospective effect. Under these circumstances, it is necessary to consider the provisions of relevant Act. For clarity the provision are reproduced as under.

8.1 Section 55 (9):-

The Commissioner or, as the case may be, the Advance Ruling Authority, may direct that the Advance Ruling shall not affect the liability of the applicant or, if the circumstances so warrant of any other person similarly situated, as respects any sale or purchase effected prior to the Advance Ruling.

On careful analysis of the section, it reveals that the Advance Ruling Authority may protect the liability of dealer in two conditions.

a. in case of applicant or

b. if the circumstances so warrant of any other person similarly situated.

The dealer has not submitted any evidences as to grant the benefit .The issue of prospective effect is to be considered on fact of the case.

(a).The Hon. Bombay high Court in case of Lalbaugcha Raja Sarwajanik Ganeshotsav Mandal (MVAT Tax Appeal No.10 of 2015) while interpreting the

section 56 of MVAT ACT,2002 laid dawn the principles regarding the granting of prospective effect and observed in relevant Para that---

> "10. On plain reading of both the subsections (1) and (2) of Section 56, it is apparent that the Commissioner may direct that the determination shall not affect the liability under the MVAT Act of the applicant or if the circumstances so warrant, of any other person a similarly situated, as respects any sale or purchase effected prior to a determination. Therefore, this is not a mandate but a discretionary power vested in the Commissioner. This discretionary power has to be exercised and while exercising it, the Commissioner, has to be guided by certain inbuilt checks and safeguards. He cannot in the garb of giving relief of the nature contemplated by subsection (2) totally wipe out the liability of any and every dealer.
>
> 11. The Commissioner is expected to exercise this discretionary power so as not to defeat the law or render its provisions meaningless or redundant. The power must be exercised bearing in mind the facts and circumstances in each case. No general rule can be laid down. The exercise of this discretionary power must be bonafide and reasonable so also sub-serving the larger public interest. The highest officer in the hierarchy is chosen by the legislature as there is a presumption that this executive functionary will exercise the discretion in genuine and bonafide cases. He must be satisfied that there is a real need and the circumstances warrant exercise of the same. The power being wide, the satisfaction must be backed by cogent and strong reasons which can be tested in a Court of law.
>
> 12. The words are of wide amplitude and if the Commissioner exercises the discretion injudiciously or arbitrarily and contrary to the object and purpose sought to be achieved by the enactment itself, his exercise of the discretionary power is always capable of being questioned. Therefore, when the Commissioner finds that there was never a disputed question to be determined and the law is very clear and free of doubt, equally its applicability, then, refusal by the Commissioner to exercise the discretion is rightly upheld by the Tribunal. Just as the Commissioner was obliged to assign

reasons for not exercising his discretionary power equally the Tribunal was in upholding his order. The Tribunal in paragraph 22 of its order found that the entire process was utilized so as to delay compliance with the mandate of the Act. The Tribunal has also found that the Commissioner refused to grant relief holding that there is no ambiguity in the provisions and there is no scope, for any doubt arising out of the provisions and relevant for the purpose of the determination. The reasons that are assigned by the Commissioner for refusing to give prospective effect to his determination order, have not been found to be suffering from any error of law apparent on the face of the record or perversity warranting interference in the appellate jurisdiction of the Tribunal."

The observations of the Hon. High Court as above are equally applicable to the Advance Ruling Authority and the powers delegated to the Advance Ruling Authority must be used in very logical and judicious manner in order to protect the liability of applicant and also sub-serve the larger public interest. **These powers are coupled with duty to see whether the applicant has really strong reasons, which necessitate the use of discretionary powers. These powers cannot be used as per wish and whims of authority.**

(b) In present case, as discussed above, there is no ambiguity in the provisions and there is no scope, for any doubt arising out of the provisions. However, the various court authorities have upheld the principles of common parlance test for interpretation of schedule entries provided in sales tax statutes. The schedule entries have been changed under MVAT ACT, 2002.The applicant fails to establish his case. He is very well aware about the rate of tax of said products.

(c) The applicant has preferred the path of litigation in spite of the clear legal position of the terms provided in the schedule entry D-12 of MVAT ACT, 2002. **The applicant is well aware of the pros and cons of litigations along with its cost.** The schedule entry related to tobacco and its product is very specific in nature and does not create any situation which gives different logical meanings. As discussed above, it is settled principle for applicability of specific entry or residuary entry that "only such goods as cannot be brought under the various specific entries in the schedules should be attempted to be brought under the residuary entry". In present

case, there is specific entry applicable to tobacco products so the ratio of various judgments relied upon are not applicable. Thus, the applicant cannot prove existence of circumstances which warrant us to use the discretionary power. **In fact use of such discretionary powers in the absence of compelling circumstances would be detrimental to legitimate government revenue and would wipe out the legitimate tax liability.** **In these circumstances, we do not allow the use of prospective effect as a tool to protect or to wipe of legitimate tax liability.**

(d) Hence, we are of opinion that there is no strong reason to hold that this advance ruling shall not affect the liability of the applicant or, if the circumstances so warrant of any other person similarly situated, as respects any sale effected prior to the Advance Ruling. Hence the dealer's request of prospective effect to the order is hereby rejected. Hence, the order is as under.

09. In view of discussion held herein above, it is held that-----

A. The product "shahin Bhajki Masheri" is covered by schedule entry, D-12 of MVAT ACT, 2002. Thus, the product is liable to tax at the prescribed schedule rate (20 %) as provided under the said schedule entry from time to time.

B. The prayer to grant prospective effect to this order is rejected.

PLACE -Mumbai
DATE - १६/०३/२०१८
SEAL

A. A. CHAHURE	V.V. KULKARNI	C. M. KAMBLE
(MEMBER)	(MEMBER)	(CHAIRMAN)

Note: If the applicant is aggrieved by this order then Appeal may be filed before the Hon. Maharashtra Sales Tax Tribunal, Mumbai within the prescribed time **(Thirty days)** as provided in the relevant Section of the Act.

No: ARA (Mumbai) 164 /2017.18/B. No ०८ Dated. १६/०३/२०१८

Copy to:-

1. The applicant.
2. The Hon. Commissioner of Sales Tax, Maharashtra State, Mumbai.
3. The Joint commissioner of Sales Tax, (VAT-ADM) Thane City, Thane.