Members present are:

1. T.K. Ziavudeen.  
   Joint Commissioner (Audit & Inspection),  
   Office of the Commissioner of Commercial Taxes, Thiruvananthapuram.

2. Dr. A. Bijikumari Amma  
   Joint Commissioner (Law),  
   Office of the Commissioner of Commercial Taxes, Thiruvananthapuram.

3. N. Thulaseedharan Pillai.  
   Joint Commissioner (General),  
   Office of the Commissioner of Commercial Taxes, Thiruvananthapuram.

Sub : KVAT Act, 2003 – Clarification U/s 94 – Rate of tax of Appy Fizz –  
Issue already settled by the Hon’ble High Court – Orders issued.

24/8/2015.


1. M/s. Parle Agro Pvt. Ltd., Palakkad, has preferred an application U/s 94 of the Kerala Value  
   Added Tax Act, 2003 seeking clarification on the rate of tax of the product ‘Appy Fizz’.  

2. The applicant is a dealer borne on the rolls of the Office of the Commercial Tax Officer,  
   First Circle, Palakkad. The dealer is seeking clarification on the following points:

   I. Whether the Product ‘Appy Fizz’ which has been classified and assessed  
      Notification No. S.R.O. No.82 of 2006 issued in exercise of powers conferred by clause (d) of sub-section (1) of Section 6 of Kerala Value Added Tax Act, 2003  
      under Entry No. 71 as “Fruit Juice Based Drink” as per Central Excise  
      Classification No. 22029020. The said entry has been realigned by Notification  
      S.R.O. No. 119 of 2008 dated 24.1.2008 vide Entry No. 9 the Entry No. 71 is  
      substituted and the product is re-aligned under Entry 5 as ‘Similar other  
      products not specifically mentioned under any other entry in this list or any  
      other schedules’ is correct or not?

   II. Whether, when there is no change either in process or in character of the  
      product. Similarly, there is no change in Excise Tariff Classification. Therefore,  
      when basic character of the product is unchanged earlier which was classified  
      under Entry No. 71 with sub-classification at Entry No. (4) as ‘Fruit Juice Based  
      Drink’ whether will get classified in residual sub-category at Entry No. 5 and  
      therefore, will be chargeable to 14.5% as per clause (d) of Sub-section (1) of  
      Section 6 of Kerala VAT Act, 2003 is correct or not?

   III. Whether the product classified under clause (d) of sub-section (1) of Section 6 of  
      Kerala Value Added Tax Act, 2003 is mutually exclusive of the products classified
under clause (a) of sub-section (1) of Section 6 of Kerala Value Added Tax Act, 2003?

3. The case was posted for hearing on 19.09.2015 and Sri. Arshad Hidayathullah, Senior Advocate, New Delhi appeared for the applicant and raised the following contentions and produced certain documents in support of their contentions.

a. The product is a "fruit juice based drink" as per the erstwhile Entry No.71 in the Notification S.R.O No. 82 of 2006 which read as under:

71 Non-alcoholic beverages and their powders, concentrates and tablets including (i) aerated water, soda water, mineral water, water sold in sealed containers or pouches (ii) fruit juice, fruit concentrate, fruit squash, fruit syrup and fruit cordial (iii) soft drinks (iv) health drinks of all varieties (v) other non-alcoholic beverages; not falling under any other entry in this List or in any of the Schedules.

(1) Water not containing added sugar or other sweetening matter
   (a) Mineral water 2201.10.10
   (b) Aerated water 2201.10.20
(2) Water containing added sugar or other sweetening matter
   (a) Aerated water 2202.10.10
   (b) Lemonade 2202.10.20
   (c) Other 2202.10.90
(3) Fruit juices and vegetable juices, unfermented and not containing added spirit, whether or not containing added sugar or other sweetening matter 2009
(4) Fruit pulp or fruit juice based drinks 2202.90.20
(5) Soft drink concentrates
   (a) Sharbat 2106.90.11
   (b) Other 2106.90.19
(6) Beverages containing milk 2202.90.30

Vide Notification S.R.O. No. 119 of 2008 dated 24th January 2008, the above said Entry was substituted as under:

71 Non-alcoholic beverages and their powders, concentrates and tablets in any form including;

(1) aerated water, soda water, mineral water, water sold in sealed containers or pouches
(2) fruit juice, fruit concentrates, fruit squash, fruit syrup and pulp and fruit cordial
(3) soft drinks other than aerated branded soft drinks
(4) health drinks of all varieties
(5) similar other products not specifically mentioned under any other entry in this list or in any other Schedules;
So the entry *Fruit Juice Based Drink* got subsumed in the residuary entry - *Similar other products not specifically mentioned under any other entry in this list or in any other schedule*. The above amendment has not changed or affected the basic character of the product. Therefore, the product remains classified under Entry No. 71 under Residuary Column No. (5)

b. The contention that the product is a fruit juice based drink is supported by the specifications contained in the erstwhile Fruit Product Order (FPO) which is presently known as Food Safety and Standards Act, 2006 and Food Safety and Standards (Food Safety and Standards and Food Additives) Regulations, 2011 which reads as under:

\[(a) \text{ The minimum content requirement is 10\% of fruit juice as per the Food Safety and Standards Act, 2006 and Food Safety and Standards (Food Safety and Standards and Food Additives) Regulations, 2011 (para 2.3.10)}\]

Further according to the Ministry of Food Processing Industries, Government of India:

> Ready to serve beverages including aerated waters containing fruit juice. The product should contain a minimum of 10\% fruit juice. The product is commonly known as Fruit Drink.

As per the permission dated 19th August 2015 issued by the Food Safety and Standards Authority of India, Ministry of Health and Family Welfare:

> *It is to inform you that you are now allowed to Manufacture, Store and Sale the product ‘Appy Fizz’ in pet bottles under the category 2.3.10 i.e. Thermally Processed Fruit Beverages / Fruit Drink/ Ready to Serve Fruit Beverages of Food Safety and Standards (Food Product Standards and Food Additives) Regulations, 2011 with name of the food item as Fruit Pulp or Fruit Juice based Drinks for which you are already holding a license.*

The applicant on the basis of the above would contend that the Ministry concerned has concluded that the product is a fruit juice based drink.

c. The applicant would also contend that the use of carbondioxide in the product is to preserve its contents from getting spoiled in transit and in storage and is meant for:

\[(a) \text{ To retain the shape of the packing of the Pet Bottle in which ‘Appy Fizz’ is packed.}\]

\[(b) \text{ Carbon dioxide is not used for the purpose of aerating the product as in the case of aerated waters within the meaning of the Entry.}\]

\[(c) \text{ According to the Institute of Chemical Technology:}\]

> “Carbon dioxide ... is mentioned as a packing gas by ... CODEX ALIMENTARIUS and its use is allowed as per GMP.”
"Carbon dioxide ... helps in extending the shelf life of the product as per the product is filled in PET bottles and is not filled aseptically."

d. The labelling is statutorily required on the packet as per Food Safety and Standards (Food Safety and Standards and Food Additives) Regulations, 2011 - 2.2.2: LABELLING OF THE PRE-PACKAGED FOODS. It is significant to note that there is no labelling requirement for aerated waters.

e. It is significant to note that there are specific restrictions on product label and particularly:

(5) Carbonated water containing no fruit juice or fruit pulp shall not have a label, which may lead the consumer into believing that it is a fruit product.

So the label itself establishes that the product is considered by the Food Safety and Standards Act, 2006 as a fruit juice based drink and not as aerated / carbonated water.

f. The applicant would contend that there is other technical opinion supporting the claim that the product 'Appy Fizz' is a fruit juice based drink and not ‘aerated branded soft drink. As per the Technical Expert Opinion of the Institute of Chemical Technology dated 11th June 2015:

In view of the above mentioned points, I am of the opinion that the APPY FIZZ is a THERMALLY PROCESSED FRUIT BEVERAGE / READY TO SERVE FRUIT BEVERAGE" ..... in spite having carbon dioxide as an ingredient which is used for preservation purpose only.”

g. In case of classification dispute with respect to the impugned product under Excise Act where the contention of the Central Excise was to classify the product as Aerated Water under Chapter Heading 22021010 and the contention of the Assessee was that the product is classifiable as Fruit Juice Based Drink under Chapter Heading 22029020 was before CESTAT in Appeal No. 3983 of 2006 preferred by Commissioner of Central Excise, Bhopal. In the said appeal, Hon'ble CESTAT held as under:

6. The revenue relied upon HSN Explanation Notes of Chapter 22, We find that our tariff is not fully aligned with the HSN Explanatory Notes. ...... The drinks based on fruit juice are specifically classifiable under Heading No. 2202.90.20 of the Tariff. In the present case, there is no dispute regarding the contents of the product. Revenue is not disputing the certificate given by the Ministry of Food and Processing Industries, New Delhi...and as per the certificate the product in question contains 23% of apple juice.

h. The Civil Appeal filed by the Revenue against the said decision was dismissed by the Apex Court vide order dated 8th July, 2009.

i. The applicant would contend that it shows that the determination on merits by the Final Fact Finding Authority has been confirmed by the Hon'ble Supreme Court and there is therefore finality on the issue of the Nature of the Product.
j. The Excise Revenue Authorities independent of the aforesaid in assessment proceedings had decided the same issue. The Joint Commissioner, Chennai vide his Order No. 13/2005 dated 30.12.2005 has held that after re-grouping the product is to be classified as Fruit Juice Based Drink which is a specific entry under Chapter Heading 22029020 of Central Excise Tariff Act, 1985. The said order has not been challenged by Revenue and therefore attained the finality.

k. The Commissioner (Appeals), Bhopal in an identical case in Order-In-Appeal No. 208-CE/BPL/2006 concerning Appy Fizz independently on an examination of the Ministry of Food and Processing Industry's evidence dated 23rd August 2005 and other evidence and the evidence of the chemical examiner came to the following conclusion in paragraph 10.

There is no doubt that Appy Fizz having more than 10% of fruit juice is a fruit pulp or fruit juice based drink ....

Here I would agree with the lower authority that carbonation of the fruit juice does not have a bearing on its classification under the Central Excise Tariff.

Neither the tariff concerns itself will either the percentage of carbon dioxide for the exact function, it performs in the beverage i.e. preservation / carbonation / aeration.

l. In another instance, the Hon’ble Commissioner of Central Excise (Appeals), Gurgaon has also by following the order of Hon’ble Tribunal has held that the product is classifiable as Fruit Juice Based Drink under Chapter Heading 22029020 vide his Order-In-Appeal No. 289/ ANS/PCK/2008 dated 8.12.2008.

4. The contentions raised in the matter have been examined and perused the relevant records. The cardinal issue raised by the applicant is the issue regarding rate of tax on ‘Appy Fizz’, which has been judicially settled by the Division Bench of the Hon’ble High Court of Kerala in the Case of M/s. Trade Lines, Ernakulam, a distributor of the applicant's product ‘Appy Fizz’, in O.T. Revision No. 114/2013 dated 17/11/2014. M/s. Trade Lines, Kalamassery, Ernakulam is a dealer borne on the rolls of the Office of the Commercial Tax Officer, Kalamassery. The assessing authority assessed the product ‘Appy Fizz’ at the rate of 20% by virtue of clause (a) of sub-section (1) of Section 6 of the Kerala Value Added Tax Act, 2003. The first appellate authority and STAT, Ernakulam confirmed the order passed by the Commercial Tax Officer, Kalamassery. In the O.T. Revision No. 114/2013 filed by M/s. Trade Lines against the decision of the Tribunal, the Division Bench of the Hon'ble High Court of Kerala decided the case as follows:

While listing out the products and indicating the rate of tax applicable, did not mention the HSN code, Going by the Rules of Interpretation, when the HSN number is not indicated in the statute or the notification issued thereunder, the interpretation should be on the basis of common parlance or commercial parlance. If the items listed out in Section 6(1)(a) are so interpreted, the only
conclusion that is possible is that Appy Fizz, the product marketed by the petitioner, is an aerated soft drink as contemplated under Section 6(1)(a) of the KVAT Act.

The manner in which an entry should be understood in a case where HSN code is not incorporated in the statute is indicated in the Rules of Interpretation as contained in the Schedule to the KVAT Act. The relevant portion of this provision reads thus;

“The commodities in the schedules are allotted with Code Numbers, which are developed by the International Customs Organisation as Harmonised System of Nomenclature (HSN) and adopted by the Customs Tariff Act, 1975. However, there are certain entries in the schedules for which HSN Numbers are not given. Those commodities which are given with HSN Number should be given the same meaning as given in the Customs Tariff Act, 1975. Those commodities, which are not given with HSN Number, should be interpreted, as the case may be, in common parlance or commercial parlance. While interpreting a commodity, if any inconsistency is observed between the meaning of a commodity without HSN Number, the commodity should be interpreted by including it in that entry which is having the HSN Number.”

From this, it is evident that those commodities in respect of which HSN Code number is not given, should be interpreted, as in common parlance or commercial parlance relied on by the learned counsel for the petitioner is concerned, that is an order passed in a dispute arising under the Central Excise and Salt Act, which is governed by the HSN Code numbers. Since HSN Code numbers are not relevant for the purpose of this case, interpretation given to similar entries in the context of the provisions contained in the Customs Tariff Act or the Central Excise Act cannot be called in aid to resolve a dispute of this nature, especially in the light of the Rules of interpretation contained in the Appendix to the KVAT Act. Therefore, we are not in a position to place any reliance on Annexures A or B orders of the Tribunal or the Apex Court.

M/s. Trade Lines moved the Hon’ble Supreme Court of India against the Judgment of the Hon’ble High Court of Kerala, but the same was withdrawn by them and therefore the SLP was disposed accordingly. By withdrawing the SLP, the dealer accepted the decisions rendered by the Apex Court. Based on the above decisions, assessments have been completed in the case of M/s. Reliant Marketing, Ernakulam - a dealer borne on the rolls of the Office of the Commercial Tax Officer, Second Circle, Thripunithura - a direct distributor of the product ‘Appy Fizz’ manufactured by the applicant company, for the years 2008-09 to 2013-14 assessing the commodity at the rate of 20%.

5. On a reading of the relevant entries, the product ‘Appy Fizz’ will not come under the Entry ‘Fruit Juice based Drinks’ having HSN Code 2202.90.20 as mentioned in sub-entry (4) of Entry 71 of S.R.O. No. 82/2006 as it stood before substitution of new Entry 71 as per S.R.O. No. 119/2008 dated 24/1/2008 (w.e.f 1/4/2007) since it was not aerated of carbondioxide. After the amendment brought
by S.R.O. No. 119/2008 dated 24/1/2008, ‘Soft drinks other than aerated branded soft drinks’ were included in sub-entry (3) of Entry 71. The Entry ‘Fruit Juice based Drinks’ having HSN Code 2202.90.20 have not subsumed in the sub-entry (5). Sub-entry (5) (as per S.R.O. No. 119/2008) excluded all the products specifically mentioned under any other Entry in the same list or any other Schedules. From 1/4/2007, as per the Finance Act – 2007, ‘Aerated branded soft drinks’ were taxable at 20% as per Serial No. 1(3) of the Table to clause (a) to sub-section (1) of Section 6. Since ‘Aerated branded soft drinks’ were included in the Schedule attached to clause (a) to sub-section (1) of Section 6 as per the Kerala Finance Act – 2007, it will not come under Entry 71 of S.R.O. No. 82/2006 as amended by S.R.O. No. 119/2008.

6. Therefore the points raised in the application for clarification is answered as follows:

1. The Department of Commercial Taxes, Kerala never classified the product ‘Appy Fizz’ as per the Central Excise Classification No. 2202.90.20 and not assessed the same at the tax rate of 12.5% or 13.5% or 14.5% at any time. As such, there is no question of substitution or subsumation of sub-entry (4) of Entry 71 to the new sub-entry (5) of Entry 71 as per the Notification S.R.O. No. 119/2008 dated 24/1/2008 (w.e.f. 1/4/2007). Hence the point is answered ‘incorrect’.

2. Since the answer to point (i) is decided against the applicant, there is no relevance in answering point (ii) raised in the application.

3. With regard to point (iii) raised in the application, it is clarified that the products classified under clause (d) of sub-section (1) of Section 6 of Kerala Value Added Tax Act, 2003 are mutually exclusive of the products classified under clause (a) of sub-section (1) of Section 6 of Kerala Value Added Tax Act, 2003.

7. At the time of hearing, the learned counsel produced a copy of the order of the Customs, Excise and Service Tax Appellate Tribunal, New Delhi dated 18/3/2008 and a copy of the Judgment in Civil Appeal No. 5354/2008 of the Hon’ble Supreme Court dated 8/7/2009 in support of the contentions raised by them. Both the above documents were filed before the Hon’ble High Court of Kerala in the Case of M/s. Trade Lines at the time of hearing, but the Hon’ble Court placed no reliance on them. (Annexure A & B appended to judgment dated 17.11.2014).

8. The above law declared by the Division Bench of the Hon’ble High Court of Kerala is binding on all authorities and hence this authority has no power to go beyond the decision either in initiating a proceeding or deciding on such an issue. The facts and circumstances of the present case
are identical to that of M/s. Trade Lines’ case and the issue involved is the same. Hence the judgment is applicable to the matter in hand.

9. In view of the settled legal position and on account of the circumstances narrated above, it is hereby clarified that the product ‘Appy Fizz’ is an aerated soft drink taxable at the rate of 20% by virtue of clause (a) of sub-section (1) of Section 6 of Kerala Value Added Tax Act, 2003.

The issues raised above are clarified accordingly.

T.K. Ziavudeen                        Dr. A. Bijikumari Amma                        N. Thulaseedharan Pillai
Joint Commissioner (A&I)                        Joint Commissioner (Law)                        Joint Commissioner (General)

To

M/s. Nagendran & Nagendran,
Advocates,
Sreepatham,
Krishnaswami Road,
Ernakulam, Kochi – 682 035.