

DEPARTMENT OF COMMERCIAL TAXES, KERALA
PROCEEDINGS OF THE AUTHORITY FOR CLARIFICATION
U/s.94 OF THE KERALA VALUE ADDED TAX ACT, 2003.

Members present are:

1. Suchala Kumar. S.K.
Joint Commissioner (General),
Office of the Commissioner of Commercial Taxes,
Thiruvananthapuram.

2. C. Lalappan.
Joint Commissioner (Audit & Inspection),
Office of the Commissioner of Commercial Taxes,
Thiruvananthapuram.

3. P.S. Soman.
Joint Commissioner (Law),
Office of the Commissioner of Commercial Taxes,
Thiruvananthapuram.

Sub : KVAT Act, 2003 – Clarification U/s. 94 – Rate of tax of Extruded Polymer Profile / PVC Profile Panel – Previous clarifications modified - Orders issued.

Read: 1. Application from M/s. Umiya Enterprise, Kochi dtd. 17/4/2012.
2. This Office Notice of even No. dtd. 17/9/2012.
3. Judgment of the Hon'ble High Court of Kerala in WP (C) No. 10468 of 2013(G) dtd. 12/4/2013.
4. This Office Notice of even No. dtd. 3/7/2013.
5. This Office Notice of even No. dtd. 9/12/2013.
6. Letter from the authorized representative dtd. 17/12/2013.
7. This Office Notice of even No. dtd. 30/12/2013.
8. This Office Notice of even No. dtd. 3/4/2014.
9. Letter from the authorized representative dtd. Nil.

ORDER No.C3/12732/12/CT DATED 5/5/2014.

1. M/s. Umiya Enterprises, Kochi vide reference 1st cited has preferred an application U/s 94 of the Kerala Value Added Tax Act, 2003 seeking clarification on the rate of tax of Extruded Polymer Profile. Sri. Paresh Patel, one of the partners of M/s. Umiya Enterprise, Kochi was heard on 26/9/2012. Meanwhile the applicant filed a Writ Petition before the Hon'ble High Court of Kerala and the Hon'ble High Court disposed the Writ Petition vide judgment read as paper 3 above directing the Authority under Section 94 of the Kerala Value Added Tax Act, 2003 to pass orders on the application. Since, the members of the Authority who originally heard the application had changed, the matter was again heard on 17/7/2013 and 20/1/2014. The applicant had also filed written submissions in the matter.

that classification of the same goods has to be uniform both at the hands of the manufacturer as well as at the hands of dealers to ensure smooth levy of tax under the value added tax scheme which entitles purchasing dealers to input-tax credit.

The applicant would also submit that the Hon'ble Kerala High Court in *Malabar Food Products Vs. Commissioner of Commercial Taxes* [WP(C) 18710 & 17676/07 dtd. 20/6/2007] has categorically observed that *in the matter of interpretation of schedule entries, the heading is not the relevant criteria, but what is relevant is the particular entry under which the goods are to be classified.* Placing reliance on the above decisions, the applicant would contend that since the Customs Tariff Item 3920 is covered by Entry 60 of the List A of the Third Schedule to the Kerala Value Added Tax Act, 2003, the goods are classifiable under Entry 60 of the Third Schedule.

6. The applicant relying on the dictionary meanings of the word 'flexible', would further contend that PVC Profile can be made to any desired shape. The applicant would also contend that the common meaning of the term 'flexible' is capable of being bent. Since the goods are capable of being bent, it satisfies the criteria of being 'flexible'. Hence the goods would fall under Entry 60 of List A of the Third Schedule to the Kerala Value Added Tax Act, 2003.

7. Another contention put forward by the applicant is that the word 'flexible' appearing in the above said Entry is applicable to 'films' alone. It has been contended that the words flexible films, plates, sheets etc. are separated by a 'comma'. Therefore each item is separate and therefore the term 'flexible' shall not apply to all the items. As such, if the commodity is a 'sheet', it is covered by Entry 60 of List A of the Third Schedule to the Act. Reliance has also been placed on the following decisions, wherein the function of 'comma' has been explained:-

- a. *Sree Durga Distributors Vs. State of Karnataka* (2007)(7VST 267(SC))
- b. *State of Maharashtra Vs. Mana Adim Jamat Mandal* (2006)(4 SCC 98)
- c. *Mohd. Shabbir Vs. State of Maharashtra* (1979) (1 SCC 568) = AIR 1979 SC 564.
- d. *Sama Alana Abdulla Vs. State of Gujarat* (1996) (1 SCC 427) = AIR 1996 SC 569

8. The applicant has referred the Customs Tariff Item 3920 which is extracted hereunder:

3920		<i>Other plates, sheets, film, foil and strip, of plastics, non cellular and not reinforced, laminated, supported or similarly combined with other materials</i>
3920 10	-	<i>Of polymers of ethylene:</i>
	---	<i>Sheets of polyethylene:</i>
3920 10 11	---	<i>Rigid, plain</i>
3920 10 12	---	<i>Flexible, plain</i>
3920 10 19	---	<i>Other</i>
	---	<i>Other :</i>
3920 10 91	---	<i>Rigid, plain</i>
3920 10 92	---	<i>Flexible, plain</i>
3920 10 99	---	<i>Other</i>
3920 20	-	<i>Of polymers of polypropylene:</i>
3920 20 10	---	<i>Rigid, plain</i>
3920 20 20	---	<i>Flexible, plain</i>
3920 20 90	---	<i>Other</i>
3920 30	-	<i>Of polymers of styrene:</i>
3920 30 10	---	<i>Rigid, plain</i>
3920 30 20	---	<i>Flexible, plain</i>

3920 30 90	---	Other
	-	Of polymers of vinyl chloride:
3920 43 00	--	Containing by weight not less than 6% of plasticizers
3920 49 00	--	Other

The applicant would contend that from a reading of the said Tariff Item, it is clear that the Customs Tariff Heading does not contain the term 'flexible' in the heading. The Tariff entry plainly says '*plates, sheets, film....*'. So it is clear that the Tariff Entry covers both rigid as well as flexible goods. By virtue of the Rules of Interpretation, wherever HSN code is given, the same meaning under the Customs Tariff Act has to be given. Therefore the relevant entry under Customs Tariff Act only needs to be considered. The applicant would therefore contend that 'flexibility' of the product is not a deciding criteria for not classifying it under Entry 60 of List A of the Third Schedule to the Act.

9. Earlier the Commissioner of Commercial Taxes vide Order No.C3/11930/08/CT dated 9/12/2008 had disposed of an application filed by M/s. Thomson Impex, Kochi clarifying that imported PVC Profile Sheets will attract tax at the rate of 12.5% by virtue of Entry 103 of S.R.O. No. 82/2006. The clarification dated 9/12/2008, as relevant to the context is extracted below:-

2. The contentions put forth were examined in detail with relevant statutory provisions. And also the sample of the product in question was physically examined. Entry No.60 of the list A to the Third Schedule (industrial inputs and packing materials) to the KVAT Act, 2003 read as; flexible plain films, plates, sheets, foil and strip of plastics non – cellular and not – reinforced, laminated, supported or similarly combined with other materials (Polyethylene, propylene, PVC) and bears the HSN Code 3920. In chapter 39 of Customs Tariff Act (plastics and articles thereof), entry relates to HSN 3920 is read as; other plates, sheets, film, foil, tape, strip and other flat shapes, of plastics, non-cellular and not reinforced, laminated, supported or similarly combined with other materials. Thus entry 60 to list A of the Third Schedule has excluded rigid articles from HSN 3920 for the purpose of the said entry.

3. On examination of the 2 samples of the product in question, presented by the applicant, its found that, the said PVC Profile Panel is having thickness of 14mm and 4mm respectively and it can even be used as a substitute of wooden frames. As the nature of the product is rigid, not at all flexible, by no means the product qualify to include in the List A of the schedule 3 to the KVAT Act. The applicant has also admitted that the product is used for making partitions in the building and for making false ceiling. Hence it's by no means the product merits to be consider as an industrial input or packing material.

4. In light of the above, its clear that, Rigid plates , plain films, sheets and strips of the kind which are included in the HSN 3920 is specifically excluded from entry 60 of the List A of the 3 rd schedule to KVAT Act, 2003. Hence the imported PVC Profile sheets dealt by the applicant will attract tax @ 12.5% by virtue of entry 103 of SRO 82/2006.

10. Subsequently another order was issued on an application filed by M/s Potentech (Guangdong) Ltd. China wherein the Commissioner of Commercial Taxes vide Order No. C3/17022/09/CT dated 24/3/2010 had clarified that:

9. The question to be decided is whether the impugned commodity would fall under Entry 60 of List A of Third Schedule to the Act carrying HSN 3920 or under Entry 118(16) or

(17) of List A of Third Schedule to the Act carrying HSN 3916 and 3921 respectively or under Entry 99 (1)(iii) of the Third Schedule as contended by the applicant.

10. With respect to the Entry 60 of List A of Third Schedule to the Act carrying HSN 3920, it has already been examined and clarified vide Order No.C3-11930/08/CT dated 9/12/2008 that Rigid plates, plain films, sheets and strips of the kind which are included in the HSN 3920 is specifically excluded from Entry 60 of the of List A of Third Schedule to the Act and hence the commodity PVC Profile Sheets was clarified as taxable at 12.5% vide Entry 103 of SRO No.82/2006.

11. With regard to the contention of the applicant regarding Entries 118(16) carrying HSN 3916 and 118(17) carrying HSN 3921, the matter is examined as follows:

a. The applicant has referred the judgment of Hon'ble Supreme Court in CCE, Aurangabad VS. Cariphans India (2008)(226) ELT 18 SC. The product under dispute in the referred judgment had two top and bottom layers and vertical flutes joining the top and bottom levels at regular intervals and space generated between the top and bottom layers and the vertical flutes remain hollow. In that case respondent claimed classification of the product under sub heading 3926.90, the department alleged it to be classifiable under 3920.29 as a sheet of plastic but the Tribunal found that the product would be classifiable under 3916 of the Central Excise Tariff. What the Tribunal considered is whether the product of the applicant was sheets of plastics would include two sheets joint together by a series of vertical ribs and those containing considerable hollow space. The Tribunal found that for something to be a sheet, it must have solid cross section. Thus the Tribunal found that those profiles which have solid cross section would be classifiable under either heading 3920 or 3921. Those which do not will be classifiable under 3916. In the said judgment the Supreme Court had upheld the findings of the Tribunal.

With respect to Entry 118(16) of the Third Schedule to the Act, from the manufacturing process detailed by the applicant in Para 2 above, it can be seen that the product of the applicant is a continuous sheet which can be cut to suit the needs and is not a profile shape or a monofilament. A "monofilament of plastic" is a single strand of filament like articles of the like used in weaving plastic sacks, making bristles, fishing lines etc. A profile as commonly understood, is formed with a specific shape or cross section and certain standards of chemical composition and strength. The size, shape, strength of such profiles is standardized during production process itself (like PVC door sections, steel rails etc.). From the contentions raised by the applicant, the product can be gathered to be a sheet, which can be cut to various sizes according to the needs. Being so, the Certificate issued by the Department of Polymer Science and Rubber Technology, CUSAT, cannot be taken into consideration, for deciding the issue at hand. Hence the product will not fall under the HSN code 3916 and consequently under entry 118(16) of the Third Schedule.

b. With respect to the Entry 118(17) of the Third Schedule carrying HSN Code 3921, the Entry include only "other plates, sheets, film, foil and strip, of plastics which are cellular, or lacquered or metallised or laminated". The applicant has not put forward any argument or evidence to substantiate such a case.

As such, it can be seen that the Judgment relied upon by the applicant or the Certificate produced, has no bearing to the issue at hand and it does not rebut the earlier Clarification Order No.C3/11930/08/CT dated 9/12/08. Hence this item would not fall under the said Entries.

12. With respect to the Entry No 99 (I) (iii) of Third Schedule, the Entry does not carry any HSN Code. It reads "PVC profiles (channels) with or without hole". The Clarification Order

No.C3-15696/07 dated 07/05/2009 was issued, interpreting this entry, whereby PVC panels, sections and frames, door panels and ceiling panels etc. without any fabrication, i.e., in the raw profile form was clarified as taxable at 4%. But PVC profile sheets seems altogether a different commodity.

13. On verification of the sample of the commodity in question it is found that the commodity can be used for making partitions in buildings and also for making false ceilings. It is also used as a substitute for wooden frames. It is admitted that the applicant reports that the commodity is imported and cleared under Tariff Entry 3920. With respect to the contention relating to the rules of interpretation of the Schedules, it has already been clarified vide Order No.C3-11930/08/CT dated 9/12/2008 that Rigid plates, plain films, sheets and strips of the kind which are included in the HSN 3920 is specifically excluded from Entry 60 of the List A of Third Schedule to the Act. Thus it can be safely concluded that Rigid PVC Profile Panel / Sheets, the commodity dealt by the applicant, is taxable at 12.5% vide Entry 103 of SRO No. 82/2006.

11. The applicant would submit that the above clarifications have to be reconsidered on account of the following points:

i. The first reason stated in the clarification order is that Entry 60 excludes rigid goods. This reason is by comparing the Customs Tariff Item 3920 and the Entry 60 of List A. Rules of Interpretation clearly states that those goods for which HSN Code are given will be given the same meaning as under the Customs Tariff Act. Therefore once the four digit Tariff Code is stated, then all the goods under the particular tariff will be covered within the said entry. The heading loses its relevance. The clarification has been issued against the above rules of interpretation.

ii. In the above said clarification orders, there was no submission on the aspect as to whether the goods are 'flexible'. On the basis of the sample produced, it was directly concluded that the goods are not flexible and they are rigid. But the goods can be bent to desired shapes. The Customs Tariff Act only states other plates, sheets, films etc. and there is no use of the word 'flexible'. Hence, the Tariff Item clearly covers 'rigid' as well as 'flexible' goods.

iii. Another reason in the clarification was that the goods are substitute for wood and hence will not come within the meaning of Industrial inputs and packing materials. In sub-para 43 of Para VI of the Appendix to the Kerala Value Added Tax Act, 2003, it is specifically stated that the purpose of the use to which the goods are put to will not be relevant for determination of classification. So, the only point to be looked into is whether the goods fall within the Tariff Entry or not. If the goods fall within a HSN Code stated in List A, then the rate of tax under the Act is 5%.

iv. The clarification has held that ***Rigid plates, plain films, sheets and strips of the kind which are included in the HSN 3920 is specifically excluded from entry 60 of the List A of the 3rd schedule to KVAT Act, 2003.*** Entry 60 never excluded any of the above commodities. Further there are no six digit or eight digit Entry from HSN Group 3920 stated in the S.R.O. No. 82/2006, so as to exclude the said goods from the Third Schedule. The applicant would

also contend that the Rules of Interpretation clearly states that when four digit Tariff Code is stated, all the goods under the said Tariff Code will be covered. That being the statutory legal position, it is not correct to state that some of the items covered under Tariff Entry 3920 will be excluded from Entry 60.

12. Alternatively the applicant would contend that without prejudice to the submission that the goods are classifiable under Tariff Entry 3920, the goods will any way be classifiable under Tariff Entry 3921. In that case the goods will fall under Entry 118(17) viz. **'other plates, films foil including rain gutters and rail guard for rubber trees'**. The applicant contends that the Clarification order No.C3/17022/09/CT dated 24/3/2010, has specifically observed as under:-

With respect to Entry 118(16) of the Third Schedule to the Act, from the manufacturing process detailed by the applicant in Para 2 above, it can be seen that the product of the applicant is a continuous sheet which can be cut to suit the needs and is not in profile shape or monofilament.

.....

From the contentions raised by the applicant, the product can be gathered to be a sheet, which can be cut to various sizes according to the needs.

The applicant would contend that it is therefore not disputed that the product is a sheet and the product would fall under 118(17). The applicant contends that goods covered by clarification order No.C3/43686/09 dated 18/4/2012 is one and the same with that the of goods covered by this application. The only difference is that the goods considered 'laminated sheet' whereas in the instant case it can be either laminated or non-laminated.

13. The applicant has requested to clarify that the commodity PVC Profile Sheets is liable to tax at the rate of 5% under the Kerala Value Added Tax Act, 2003.

14. The contentions raised by the applicant were examined.

15. The tax rate of the impugned product viz. PVC Profile Sheets / Panels was the subject matter of agitation before the Kerala Value Added Tax Appellate Tribunal, Ernakulam in T.A. (VAT) Nos. 797/2010, 798/2010, 799/2010, 800/2010, 801/2010 & 821/2010 filed by M/s. Thomson Impex, Ernakulam. The gist of the case is extracted below:

M/s. Thomson Impex, Kochi a dealer in PVC Profile Sheets remitted tax at the rate of 4% on a satisfaction that the commodity PVC Profile Sheets / Panels will fall under Serial No. 60 of List A of the Third Schedule. The assessing authority concerned viz. Assistant Commissioner (Assessment), Special Circle – II, Ernakulam though accepted the return proposed to re-open the assessment U/s 25 of the Act on the ground that the rate of tax of PVC Profile Panels/Sheets is 12.5% as against 4% returned and that there is an escapement of tax to that extent. The reasoning of the assessing authority is that the appellant has sold imported PVC Profile Panel popularly known as 'Multiwood' along with other flexible PVC sheets and claimed reduced tax at the rate of 4% and that PVC Profile Panel and sheets dealt by the appellant firm which is used as a substitute of wood and plywood will attract tax at 12.5% and this position was clarified by the Commissioner

of Commercial Taxes as per Order No. C3-11930/08/CT dtd. 9/12/2008 and the claim for reduced rate of tax at 4% is unacceptable. The assessment was completed and aggrieved by the finding of the assessing authority, the appellant filed appeals before the Deputy Commissioner (Appeals), Ernakulam who confirmed the order of the assessing authority. The appellant was aggrieved by the view taken by the appellate authority and hence the second appeals were instituted.

After examining the Bill of Entry issued by the Customs Authorities, the statutory position in the light of Entry 60 of List A of the Third Schedule to the Kerala Value Added Tax Act, 2003, Rules of Interpretation of the Schedules appended to the Act, Tariff Item 3920 of the Customs Tariff Act, and also the judgment of the Hon'ble Supreme Court of India in Reckitt Benckiser (India) Ltd. Vs. Commissioner of Commercial Taxes and Others **(2008) 15 VST 10**, the Tribunal by its common order dated 12/5/2011 allowed the appeal. The operative portion of the said order is extracted hereunder:

12. From the Rules of Interpretation of Schedules as provided in the Appendix to the Act and from the above decision of the Hon'ble Supreme Court of India, it is clear that those commodities which are given with HSN number should be given the same meaning as given in the Customs Tariff Act, 1975 and those commodities, which are not given with HSN number, should be interpreted as the case may be, in common parlance or commercial parlance. We must advert here that the assessing authority or the appellate authority has not properly touched this aspect earlier to make a proper evaluation in the matter of classification. It is evidenced in this case that the goods are cleared through bill of entry issued by the Customs Authorities and the Customs Authorities have cleared goods under Tariff Entry No. 3920.49.00. It therefore follows that the Customs Authorities have classified the goods under Tariff Entry 3920.49.00. Thus it is clear that the classification accepted by the Central Excise Department and as evidenced by the invoice bill of entry is relevant for the purpose of classification under the Act. In Reckitt and Benckiser (India) Ltd. Vs. Commissioner of Commercial Taxes and Others (supra), the Hon'ble Supreme Court has held that The Kerala Value Added Tax Act, 2003, was aligned with the Customs Tariff Act, 1975, which in turn was aligned with the Harmonised System of Nomenclature (HSN) and consequently each product in question had to be seen in the context of the Harmonised System of Nomenclature (HSN) Code and the judgments based thereon. We have already referred to Section 6(8) of the Act which provides that the Rules of Interpretation of Schedules shall be as said out in the Appendix which has been also referred earlier. On a proper understanding of the law on the subject, we are constrained to take a view that the finding rendered by the assessing authority and the appellate authority in fixing the rate of tax at 12.5% in this case is totally erroneous and basing on a surmise which have no sanction of law. We therefore take a view that the rate of tax for the impugned goods in this case is 4% as returned by the appellant. The assessments for the various periods commencing from April 2009 to September 2009 are accordingly set aside. The assessing authority is directed to pass a revised assessment order by fixing the rate of tax at the rate of 4%.

16. There is no dispute to the fact that the HSN Code of the commodities involved in all the clarification orders, including this, is 3920. As such in the light of the order of the Supreme Court in Reckitt Benckisers case (2008) 15 VST 10, and the order of the Tribunal stated supra, the reasoning in the clarifications issued earlier needs reconsideration. Hence, in view of the facts cited supra, accepting the reasonings of the Tribunal order, it is clarified that the commodity PVC Profile Panel / Sheets falling under the HSN Code 3920 would be taxable at the rate of 5% by virtue of Entry 60 of List A of the Third Schedule to the Kerala Value Added Tax Act, 2003. The

clarification Orders No. C3-11930/08/CT dated 9/12/2008 and C3/17022/09/CT dated 24/3/2010 stand modified to the above extent.

The issues raised above are clarified accordingly.

Suchala Kumar. S.K
Joint Commissioner (General)

C. Lalappan
Joint Commissioner (A&I)

P.S. Soman
Joint Commissioner (Law)

To

1. M/s. R. Krishna Iyer & Co.,
Chartered Accountants
134, Jyothy, Panampilly Nagar,
Cochin – 682 036.
2. M/s. Umiya Enterprise,
Indradhanush Apartments,
Shop No. 7,8 & 9, T.D. Road, Kochi – 682 035.
3. M/s. Thomson Impex,
Anna Maria Complex,
P.T. Usha Road, Kochi (vide reference C3-11930/08/CT dated 9/12/2008)

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