

CASE NO.:
Appeal (civil) 2720 of 2008

PETITIONER:
M/s. Mauri Yeast India Pvt. Ltd.

RESPONDENT:
State of U.P. and another

DATE OF JUDGMENT: 10/04/2008

BENCH:
S.B. SINHA & HARJIT SINGH BEDI

JUDGMENT:
JUDGMENT
REPORTABLE

CIVIL APPEAL NO. 2720 OF 2008
(Arising out of SLP (C) No. 11744 of 2007)
AND

CIVIL APPEAL NO. 2721 OF 2008
(Arising out of SLP (C) No. 12775 of 2007)
M/s.Kothari Fermentation and Biochem Ltd.

\005 Appellant

Versus
State of U.P. and another

\005. Respondents

S.B. SINHA, J.

1. Leave granted.

2. Interpretation of an Entry in the U.P. Trade Tax Act, 1948 is in question in these appeals which arise out of a judgment and order dated 16th April, 2007 of the High Court of Judicature at Allahabad in CMWP No. 554 of 2006 and CMWP No.98 of 2007.

3. The State of Uttar Pradesh enacted the U.P. Sales Tax Act (for short, "the said Act"). In exercise of its powers conferred upon it under clause (d) of sub-section (1) of Section 3-A of the said Act, a notification was issued by the State on 7th September, 1981 prescribing description of goods, point of tax and rates thereof, Entry 21 whereof reads as under:-

Sl. No.	Description of goods	Point of Tax	Rate of tax
21	Chemicals of all kinds including fuel gases.	M or I	8 %

In supersession of the said Notification, another notification was issued on 23rd November, 1998, Entry 22 whereof reads as under:-

Sl. No.	Description of goods	Point of Tax	Rate of tax
22	Chemicals of all kinds including fuel gases.	M or I	10 %
		Provided that in the case of fuel gases if the sale is by any of	

the undertaking registered

as dealer in the name and style of M/s. I.O.C. Ltd., B.P.C.. Ltd., H.P.C. Ltd., and I.B.P. Co. Ltd., the tax shall be levied at the point of sale by such dealer to a person other than any of the aforesaid dealers.

Yet again on or about 1st March, 2003 a Notification was issued, entry (i) whereof is as under :-

Sl. No.	Description of goods	Point of Tax	Rate of tax
(i)	Chemicals of all kinds	M or I	4 %

4. Before embarking on the question of law, we may notice the representative fact of the matter involved in the appeal arising out of SLP (C) No. 11744 of 2007.

Appellants carry on business of manufacturing and sale of yeast which is used for the purposes of manufacturing bread etc. They had been filing returns before the sales tax authorities treating 'yeast' to be a 'chemical' within the meaning of the aforesaid entry for a long time. The said returns had been accepted and orders of assessment were passed relying on or on the basis thereof.

5. We may at the outset notice that, a Bench of the Gujarat High Court in State of Gujarat vs. Bhagwati General Agency (Import) : 1991 (83) Sales Tax Cases 347 held 'yeast' to be a 'chemical' within the meaning of Entry 9 of Part A Schedule II of the Gujarat Sales Tax Act, 1969 and a Bench of the Kerala High Court in State of Kerala vs. A.M. Jose : 2004 (137) STC 82 opined 'yeast' to be a 'living organism' and, thus, not a "chemical" interpreting Entry 29 of the Kerala General Sales Tax Act.

6. By an order dated 10th March, 2005 the Assessing Officer while accepting the books of account as well as the disclosed turnover, rejected the classification of sale of 'yeast' under the head 'chemical' and imposed tax thereupon treating the same to be as "unclassified item". In support of the said order, reliance was placed on the decision of the Kerala High Court in A.M. Jose (supra). Appeals preferred thereagainst by the appellants before the Joint Commissioner (Appeals) and the Trade Tax Tribunal were dismissed.

7. For the Assessment Year 2003-2004, a notice was issued to the appellant on 9th March, 2006 directing it to show cause why tax shall not be imposed on sale of 'yeast' @ 10 % as an unclassified item.

8. Questioning the legality thereof, a writ petition was filed by the appellant which, by reason of the impugned judgment has been dismissed by the High Court.

9. Mr. S. Ganesh and Mr. Amit Chadha, learned Senior counsel appearing on behalf of appellants, would submit :-

1) That the High Court committed an error in passing the impugned order in so far as it failed to take into consideration that the 'yeast' had all along been treated to be a 'chemical'. It has been so classified under the Central Sales Tax Act.

2) The chemical composition of 'yeast' as also the purpose for which the same was used having been accepted by the respondents in

their counter-affidavit and as would be evident from the other materials brought on record including the certificates issued by the users thereof, it is clearly borne out that 'yeast' is a chemical' and not a 'living organism'.

3) In any event, if 'yeast' is a plant, as has been held by the Kerala High Court, no tax would be payable thereupon in view of the Entry No.25 of the Notification dated 31st January, 1985.

10. Mr. Krishnan Venugopal, learned counsel appearing on behalf of the respondents, on the other hand, submitted:-

1) In view of the fact that the question whether yeast would be a plant or not being a mixed question of law and the process for finding out the same having not been gone into, this Court should not pronounce any judgment thereupon.

2) In any event 'yeast' being a 'fungi' is not a plant as has been noticed in the New Encyclopedia Britannica Volume 19 page 59.

3) The 'dictionary' and the 'chemical meaning' of 'yeast' being 'living organism' whereas the chemical being a non organism, the decision of the Kerala High Court should be held to have laid down a correct law as opposed to the decision of the Gujarat High Court.

4) If in other Acts or Circulars, 'yeast' has been shown to be a 'chemical' the same should be held to be wholly irrelevant for the purpose of interpretation of an 'Entry' in a fiscal statute which must be interpreted on its own.

5) A dictionary meaning, in a case of this nature, is required to be considered with a view to reconcile and harmonise the tariff entry and only because an article is exclusively used for manufacture of a particular item, the same should not be held to be decisive.

6) Classification under a tariff entry being essentially a question of fact, should be determined on the basis of relevant material by the authorities. Onus of proof being on the assessee, it is for it to establish that 'yeast' is not a 'plant' and for the said purpose the matter should be remitted to the assessing authority.

7) The question, admittedly being pending before the High Court in Tax Revision Cases for the earlier years, a writ petition was not maintainable.

11. Before embarking on the questions raised before us by the learned counsel for the parties we may notice the chemical composition of 'yeast' :-

"Bakers' yeast contains (on a dry basis) about Carbon 46 %, Oxygen 32 %, Nitrogen 8.5 %, Hydrogen 6.0 % and Ash 7.5 % (P2 O5 - 5.5 %). Based on this composition, the Empirical formula is C8 H12 O4 NP0.1"

(As per Harcourt Butler Technological Institute).

12. The chemical composition of yeast as also its chemical formula stand accepted by the respondent in their counter-affidavit in paragraph 4 stating :-

"4. The yeast is mixture comprising of Ammonia, Diammonia Acid, Mono Ammonia Acid, Phosphorous Pentaoxide, Potassium Oxide, Mangesium Oxide, Calcium Oxide etc. In dried form, the yeast consists of the following ingredients :

Carbon	46 %	
Oxygen	32 %	
Nitrogen		8.50 %
Hydrogen		6.00 %
Ash		7.50 % "

13. It also stands admitted that yeast is also used in baking, pharmaceutical industries and for domestic applications, for example, in bread making process. Yeast ferments simple sugar and produces carbon dioxide and alcohol. It is capable of bringing about a chemical reaction or chemical effect.

14. Harcourt Butler Technological Institute, in respect of Bakers' yeast states as under :-

"Bakers' yeast is one of the biochemical industry products consisting of cellular mass/biomass of living microorganisms (*Saccharomyces cerevisiae*). Bakers' yeast contains (on a dry basis) about Carbon 46 %, Oxygen 32 %, Nitrogen 8.5 %, Hydrogen 6.0 % and Ash 7.5 % (P₂ O₅ - 5.5 %). Based on this composition, the Empirical formula is C₈ H₁₂ O₄ NP_{0.1}. It is produced on commercial scale using fermentation of molasses (as a source of sugar). The following chemical equation represents its synthesis based on sucrose :-

0.55 C₁₂ H₂₂ O₁₁ + 0.57 NH₃ + 2.51 O₂ + 0.02 P₂ O₅ ---
(Sucrose)

C_{3.92} H_{6.3} O_{0.6} N_{0.57} P_{0.04} + 2.68 Co₂ + 3.83 H₂O
(Bakers' yeast)

Yeast is widely used in baking, pharmaceutical industries and for domestic applications. In bread making process and related sweet dough processes, yeast ferments simple sugars and produces Carbon dioxide and alcohol as shown by following equation.

C₆ H₁₂ O₆ + Yeast ----- 2 Co₂ + 2 C₂ H₅ OH
Glucose Carbon dioxide Ethanol

The fermentation is gradual, beginning slowly and increase in rate with time. This is due to two conditions in dough :

- i) Yeast cells are multiplying and their enzymes are becoming more active while the dough is prepared and held, and
- ii) Sugar for fermentation is gradually being liberated from starch in the dough by the action of natural flour enzymes.

The evolved carbon dioxide acts as a leavening agent, which leads to the porosity of bread. The porosity is caused by the carbon dioxide produced and retained in the dough by the film forming properties of a certain complex present in the dough called gluten.

The bakers' yeast is available as compressed cake or in dried form as powder, small granules, pellets or flakes. It should not be slimy or mouldy and should not show any sign of deterioration or decomposition. It should be free from adulterants and other extraneous materials."

15. In an order dated 28th May, 1999, the Yeast Controller and Excise Commissioner, U.P. stated:-

"After carefully consideration application/representation of the Yeast Manufacturing Association of India, it has been decided that yeast has been included in the category of Chemical Industries in the current yeast session of 1998-99 because it is a bio-chemical for yeast units. Out of 40% reserved for chemical units in the current yeast year 1998-99, the share/quota of the yeast manufacturing units in the State is hereby determined at 3,00,000 Quintals (Three lakhs quintals). Approval is hereby accorded to the Yeast Units of the State to lift the balance yeast within the prescribed quota/limit. However, yeast so lifted shall not exceed more than 95% of the total capacity of the Yeast Units."

16. The Central Government in a circular issued on 12th November, 1958 issued under the Central Sales Tax Act prescribed in Form No. 6, while categorizing 'Distilleries and Breweries', described 'Chemicals' as under :-

"Chemicals" \026 (1) Sulphuric acid, (2) Ammonium sulphate, (3) Flavouring agents, (4) yeast, and (5) other chemicals."

17. Yeast has been defined in several dictionaries and treatises in various forms, some of which may hereafter be noticed.

Yeast is described in the Concise Oxford Dictionary (10th Indian Edition) as "a microscopic single-celled fungus capable of converting sugar into alcohol and carbon dioxide". The dictionary further gives the biological description of yeast as "any unicellular fungus that reproduces vegetatively by budding or fission".

The Medical Dictionary also attributes the same meaning to yeast.

Encyclopedia Britannica describes yeast as "any of certain economically important single-celled fungi". It is further stated that "in food manufacture 'yeast' is used to cause fermentation and leavening. The fungi feed on sugars, producing alcohol (ethanol) and carbon dioxide; in beer and wine manufacture the former is the desired product, in baking, the latter. In sparkling wines and beer some of the carbon dioxide is retained in the finished beverage. The alcohol produced in bread making is driven off when the dough is baked."

Encyclopedia Americana describes yeast as "a tiny living plant". "It makes the bread light and tender; it also adds flavour."

18. Sri. S.C. Dubey, a Baking Technician of repute of U.S. Wheat Associates, New Delhi has done an extensive research on yeast and its functions. It is profitable to refer to the following passage from his writing:-

"Yeast is unicellular microscopic plant. Its structure consists of cell wall, protoplasm, and vacuole. It requires food (in the form of simple sugar), moisture and temperature climate for its growth and reproduction.

Yeast multiplies by budding. When yeast cell is placed in a liquid medium at optimum temperature (80-85F) containing simple sugar (dextrose or fructose), then the cell starts growing buds on its cell wall which keep on growing until daughter cells acquire the same size as mother's cell. Then the buds separate from mother cell and start producing other buds.

The protoplasm of yeast contains certain enzymes by which fermentation activity of 'yeast' is made possible. Enzymes are very minute substances produced by living organisms, which, by its mere presence, are capable of bringing about or speeding up certain

chemical changes. For example, food is digested through the action of certain enzymes, starch is converted into sugar by the action of enzymes. Although an enzyme does affect chemical changes, a very small quantity of enzyme is capable of converting a very large quantity of substance from one form to another form, but enzyme itself is neither destroyed nor changed. Hence, enzymes are known as catalytic agents."

19. Bakers Handbook on Practical Baking compiled by U.S. Wheat Associates, New Delhi describes yeast as follows:-

"Yeast is a microscopic one-celled plant belonging to the fungus order, which ordinarily multiplies by a process known as budding and which causes fermentation when placed under suitable conditions.

Fermentation is a general term which covers aerobic and anaerobic changes brought about by micro-organisms and includes the production of carbon dioxide gas, alcohols, acids and some other by-products."

It is further stated that in the said Handbook that "yeast is a very potent source of supply of enzymes. An enzyme is produced by living cells, either animal or vegetable..... The important enzymes in yeast are Invertase, Maltase and Zymase."

20. Although strong reliance has been placed on some certificates issued by various private organizations stating that in commercial parlance 'yeast' is treated to be a chemical, we may for the purpose of the case ignore the same.

21. Keeping in view the aforementioned backdrop we may analyse the conflicting views taken by the Gujarat High Court and the Kerala High Court.

22. The relevant entries, which were the subject matter of interpretation of the Gujarat High Court are :-

Description of goods	Rate of sales tax	Rate of purchase tax
9. Dyes and chemicals other than those specified in any other entry in this or any other Schedules.	Three paise in the rupee	Three paise in the rupee
13. All goods other than those specified from time to time in Section 18 and in Schedules I and II and in the preceding entries.	Five paise in the rupee	Three paise in the rupee

23. It was held that 'yeast' is a composition of chemicals and its properties have chemical reaction through the process of enzymatic conversion of carbohydrates into alcohol and carbon dioxide and thus capable of bringing about a chemical reaction or chemical effect. It was held to be a "chemical". In so opining the High Court referred to Webster's Seventh New Collegiate Dictionary, stating:-

" With the above meaning of the word "chemical" the question which is required to be answered is whether "yeast" is a substance which is used in chemical operations or for producing chemical effect in the manufacture of breads, pastries or other products resulting from baking process. About the basis ingredients of it, viz., that it possesses reactive properties of bringing about a chemical reaction, there is no dispute and, therefore, it can be said to be a substance used for

producing a chemical effect. In that sense of the term, we find that yeast can be described as "chemical". From the composition of yeast and its essential characteristics, it is clear that it is a substance obtained by a certain process and is used for producing certain chemical effect."

24. A contention was also raised before the High Court that 'yeast' is generally used in baking process for bringing about fermentation which in turn is brought about by the life activities of an unicellular plant, microscopically small yeast cell. The process is fundamentally biological and, therefore, yeast is primarily a biological agent and it is not a chemical. The said submission was repealed holding :-

"We are not in a position to accept the submission of learned Assistant Government Pleader firstly, because there is absence of any entry in any of the three Schedules dealing with living micro-organisms or any biological product and, by this reference, we are not called upon to decide as to whether yeast would more appropriately fall into the description of biological product or not, secondly while construing an entry in fiscal statute we shall have to keep in mind the fact that when there is a specific entry in the description of which entry the product in question can more appropriately fall, it is not permissible to have resort to a residuary entry, thirdly, we have also reached a finding that by its composition yeast can be described as chemical, fourthly we have found that yeast is a substance having reactive properties and lastly we note that we are called upon to decide as to whether yeast is "chemical" and not the question as to whether "yeast" can be appropriately classified as living micro-organism.

25. The Kerala High Court, on the other hand, was interpreting Entry 29 of Kerala General Sales Tax Act, which reads :-

"Chemicals including caustic soda, caustic potash, soda ash, sodium sulphate, sodium silicate, sulphur, chemical components and mixtures not elsewhere classified in this Schedule."

It was in the context of the said Entry held by the High Court :-

"10. Though dictionaries are not generally meant for resolution of legal issues, yet it is one source of information relating to an issue. It may be seen that the expression chemical is generally attributed to mean a substance obtained in or used for chemical operation. Necessarily the substance is a chemical. It is one thing to say that a substance is a chemical and yet another thing to say that an organism is capable of chemical operation. A chemical process may be there in fermentation since the fungi feed on sugars and produce alcohol and carbon dioxide. But it is to be noted that the organism that is used in the process is fungus. It needs no research to understand that fungus is a non-green plant and includes such forms as mushroom, mould, rust and puffball. As we have already noted above yeast is a uni-cellular fungus. All the authorities referred to above have in unmistakable terms expressed that fungus is a living organism, a plant which has its own mode of multiplication mainly by budding and occasionally by fission. It is not a lifeless substance, but a living organism. Merely because a living organism is used in a chemical process, it cannot be held that that living organism is a chemical substance. It retains its

characteristic as a living organism even in the process."

Differing with the views of the Gujarat High Court, it was observed:-
"Thus the decision though heavily relied on by the learned Government Pleader, is distinguishable on those two major counts: Firstly the court was considering whether yeast powder obtained by a process using molasses and ammonia is a chemical. We have already held that there cannot be any quarrel that any substance obtained by using a chemical substance can be termed as chemical. Secondly it has to be seen that the court was not deciding the question as to whether yeast is a living micro-organism whereas in the instant case the question which we have been analysing is as to what is yeast. In other words, what we have tried to analyse is as to what is yeast and not what is there in yeast. For the purpose of understanding an entry in a taxing statute it is sufficient to understand as to what is the item."

The commercial parlance test was rejected, inter alia, relying upon the decision of this Court in *Rallis India Ltd. vs. State of Tamil Nadu* : [1999] 112 STC 203.

It was concluded :-

"18. For the purpose of taxation of an article the approach should be what is an article and not what is in it or what is it capable of. Yeast may be capable of a chemical operation. But yeast is not a chemical. It is a living organism. Hence by no stretch of imagination a living organism can be classified as a chemical substance for the purpose of taxation under the Act. 83 STC 347 does not apply in the facts and circumstances of the case. The question as to whether yeast is a living organism was not considered at all in the decision."

26. The authorities under the Act as also the High Court relied solely on the decision of the Kerala High Court. No attempt was made to interpret the entry in question. Evidently the High Court did not answer the question as to whether the Kerala High Court decision can be taken to its logical conclusion, keeping in view the nature of entry which was the subject matter of interpretation. Yeast in all situations was held to be a plant. For the said purpose, the question was required to be considered at some details by the appropriate authorities.

27. Encyclopedia Americana (International Edition) Vol. 29 at pages 657-658 details the procedure for growing 'yeast'. It speaks of different 'yeasts' grown to be used for different purposes, in the following:-

" The procedures for growing yeasts are fundamentally the same in each industry. A pure culture is obtained by isolating a single yeast cell and growing it on a nutrient medium consisting of sugars (molasses, starchy grains, potatoes), a source of nitrogen (ammonia, grain steepwater), minerals and water of controlled acidity. As growth proceeds, the culture is transferred to successively larger batches of medium until the final batch often exceeds 100,000 gallons. When growth is completed, the yeast cells are separated from the spent medium on which they grew.

Yeast grown for bread making, food, feed and medicinal purposes are the primary product of the fermentation process and produce little alcohol. The spent medium is the byproduct and is discarded after

centrifuging out the yeast cells. Yeasts grown during fermentations for beer, ale, spirits, wine, and industrial alcohol, however are the byproducts, while the spent medium becomes the final consumer product."

28. The rate of tax for 'yeast' was 8%. In the year 1998 the rate was increased to 10%, whereas in the year 2003 it was brought down to 4%. Strangely enough from 1981 to 2003 no attempt was made to classify 'yeast' as a residuary item.

29. Submission of Mr. Krishnan Venugopal that the rate of tax being the same, it was not necessary to do so cannot be accepted, as from 1998 to 2003 the rate of tax was 10%.

30. 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.

31. The interpretation of the entry which fell for consideration before the Kerala High Court *ex facie* speaks purely of 'organism' and not of the man-made chemical. It does not speak of an organic chemical.

32. The entry in question, however, is of wide import. It takes within its purview chemicals of all kinds. It does not make any distinction between an inorganic chemical and an organic chemical. The dictionary meanings of the terms which have been noticed by Kerala High Court as also the Gujarat High Court may not be of much relevance in the aforementioned context, although they act as a good guide. 'Yeast' may answer both 'chemical' as also 'fungi'. It is significant to notice that whereas fungi at one point of time was considered to be a plant and in fact has been held to be so by the Kerala High Court, only in the New Encyclopedia Britannica, it is not considered to be a plant, stating :-

"Fungi

The kingdom Fungi (Mycota) comprises a large group of eukaryotic organisms having two common characteristics: anatomically, their principal mode of vegetative growth is through mycelium; physiologically, their nutrition is based on absorption of organic matter. Although historically included in the plant kingdom, fungi lack chlorophyll and other structures common among true plants and have therefore been placed in a separate kingdom. Fungi are the culmination of a major direction in evolution distinctly different from that of plants or animals; this evolutionary line was established by organisms whose nutrition was based on absorption of organic matter. Fungi are among the most widely distributed organisms on Earth and are of great importance. The fungi include yeasts, rusts, smuts, mildews, molds, mushrooms, and others. Many fungi are free-living in soil or water; others form parasitic or symbiotic relationships with plants or animals, respectively. (Slime molds, straddling the animal and plant worlds, are treated in the article PROTISTS.)

The mushrooms, by no means the most numerous or economically significant of the fungi, are the most conspicuous members of the group; thus, the Latin word for mushroom, fungus (plural fungi), has come to stand for the whole group. Similarly, the study of fungi is known as mycology - a broad application of the Greek word for mushroom, mykes. Fungi other than mushrooms are sometimes collectively called molds,

although this term is better restricted to fungi of the sort represented by bread mold."

(Emphasis added)

33. The meaning of the word 'of' used in an item in a fiscal statute must be considered having regard to the intention of the maker thereof. The court shall, for the said purpose, put itself in the chair of the legislature. It would presume the 'legislation' to be reasonable.

34. The Executive Act of issuing a notification is a legislative action. The authorities are supposed to know the meaning of the word used therein.

'Yeast', admittedly, has a chemical composition. It has a chemical formula. It was accepted to be a chemical by the assessing authority for a long time. It not only takes within its sweep as to what it would be, but what it can be or what it does.

35. The Kerala High Court itself opined that any substance obtained by using a chemical substance can also be termed as "a chemical".

36. For the purpose of determining the question, the chemical composition of yeast is relevant. Determination of and what is there in 'yeast' would also be relevant.

37. No test laid down by this Court i.e. common parlance test or user test or any other test can be said to be decisive in a situation of this nature.

The word used in the statute, it is well settled, must take its colour from the object it seeks to achieve.

38. The High Court as also Mr. Kishan Venugopal has placed strong reliance on the decision of this Court in *Rallis India Ltd. vs. State of Tamil Nadu* : [1999] 112 STC 203.

The question which arose for consideration therein was as to whether the Appellate Tribunal being a fact finding body and having analysed the materials on record and came to the conclusion that 'Gelatine' did not fall within the meaning of 'chemical' which had attained finality between the parties, the High Court should have re-opened the matter.

It is, however, significant to note that even for the said purpose the opinion of the experts were relied upon. For the purpose of holding that Gelatine is a protein obtained from collagen which originates from the animal kingdom mainly from skin and bones with suitable pressure, opinion of the expert was relied upon which stated that 'Gelatine' has no specific formula. Yet again, another expert opined that chemical is defined as compound of substances of definite molecular composition.

39. If 'yeast' has a definite molecular composition and is a single molecular species with a definite molecular structure, it would answer the said description. It has all the trappings of a chemical. It has a definite composition or attributes of the properties. A bye-chemical substance for the purpose of interpretation of an entry in a fiscal statute may also be held to be a chemical.

40. It is now a well settled principle of law that when two views are possible, one which favours the assessee should be adopted. [See - *Bihar State Electricity Board and another vs. M/s. Usha Martin Industries and another* : (1997) 5 SCC 289.

It is not a case where application of a commercial meaning or trade nomenclature runs contrary to the context in which the word was used as was the case in *Akbar Badrudin Giwani vs. Collector of Customs* : (1990) 2 SCC 203.

41. There cannot be any quarrel with the proposition that construction of the word is to be adopted to the fitness of the matter of the statute. But for determining the said question, several factors which would be relevant are required to be gone into. The trade or commercial meaning or the end user context would, thus, be a relevant factor.

It is equally true that the category of the persons using the same, as for example the boys using a particular item, would not necessarily lead to the conclusion that they are 'toy' as they may answer the description of any other entry and in that view of the matter the decision of this Court in O.K. Play (India) Ltd. Vs. Commissioner of Central Excise, Delhi-III, Gurgaon : (2005) 2 SCC 460, in our opinion, has no application to the fact of the present case.

42. Strong reliance has been placed by Mr. Venugopal on CCE vs. Acer Inda Ltd. : (2004) 8 SCC 173 wherein the question which arose for consideration was whether a computer without software loses its character of a marketable commodity. Therein it was held that it did not. Such a question does not arise herein for our consideration.

43. Reliance has also been placed by Mr. Venugopal on Commissioner of Central Excise, Delhi vs. Carrier Aircon Ltd. : (2006) 5 SCC 596 for the proposition that for the purpose of classification, the relevant factors are statutory fiscal entry, the basic character, function and use of the goods; and for the said purpose, the end use to which the product is put to, cannot determine the classification of that product. In that case as to in which entry 'chiller' should be put was in question. It was held that it would come within the meaning of refrigerators, freezers and other refrigerating or freezing equipment as the same is supported by the explanatory notes appended thereto.

44. Yet again there is no quarrel with the proposition that the classification of 'goods' under a particular entry is a question of fact. However, in the instant case, no disputed question of fact has been raised. In fact, no attempt has been made to find out the fact. The authorities as also the High Court, without assigning any reason blindly followed the Kerala High Court decision. It did not pose unto itself the right question. The difference between the entries was not considered.

45. Submission of Mr. Venugopal that having regard to the provisions contained in Section 101 of the Indian Evidence Act, onus would be on the assessee, cannot be accepted for more than one reason. Firstly, because the provisions of the Evidence Act have no application. Secondly, because the classification adverted to by the assessee had been accepted by the revenue for more than 20 years. A different construction to an entry cannot be resorted to only because the rate of tax has been lowered. As the said classification had been accepted by the revenue for a long time, the onus would be on it to show as to why a different interpretation thereof should be resorted to particularly when no change in the statutory provision has taken place.

46. Reliance has been placed by the learned counsel on Krishna Steel Industries vs. Collector of Central Excise, Patna : (2004) 11 SCC 239 wherein having regard to the interpretation of Chapter Note 6, the classification had been made either under Chapter 84 or under Chapter 73 and the subject matter thereof having held to be not classifiable under Chapter 84, was held to be classifiable only under Chapter 73 stating :

"5. The authorities below, have on the basis of Note 6 held that these balls are classifiable under Tariff Item 73.08. We are in complete agreement with the view taken by the Collector and the Tribunal. Even though earlier these balls could have been classified under the then

Tariff Item 26-AA, with the incorporation of Chapter Note 6, the item now has to be classified either under Chapter 84 or under Chapter 73. These balls cannot be classified under Chapter 84 and thus necessarily have to be classified under Chapter 73.

6. We are unable to accept the submission that it still continues to be a forged item and therefore must fall under Tariff Item 72.08 (which according to counsel for the appellant, is equivalent to old Tariff Item 26-AA). Such an argument, in our view, merely needs to be stated to be rejected. An item has to be classified in accordance with chapter notes. The only reason these balls were earlier classified under old Tariff Item 26-AA was because there was no such chapter note. Once Chapter Note 6 was introduced, the classification must be in accordance therewith."

It was in the aforementioned situation that the circular issued by the Board prior to introduction of Chapter VI was held to be not applicable stating:-

7. It must also be mentioned that an attempt was made to rely on a Board circular. We, however, find that the circular was not relied upon before the Collector nor before the Tribunal. Material not presented before the lower authorities and/or the Tribunal cannot be allowed to be relied upon for the first time in this Court. Even presuming that the circular could be shown to this Court, we find that the circular merely deals with forged items. The circular does not deal with such types of balls. Thus, the circular does not mention Chapter Note 6. The circular therefore has no application.

47. Appellants had relied upon the circular dated 28th May, 1999 issued by the Yeast Controller and Excise Commissioner, Uttar Pradesh. They also referred to a Circular dated 12th November, 1958 issued by the Central Government, whereby, for the purpose of some other statutes, yeast has been considered to be a chemical. A similar interpretation having been made to the entry in question by the authorities themselves, they cannot be said to be wholly irrelevant, particularly having regard to the doctrine of 'Executive Construction'

48. 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.

49. Common parlance or commercial parlance test, we may notice, has been applied recently in HPL Chemicals Ltd.. vs Commissioner of Central Excise, Chandigarh : (2006) 5 SCC 208 stating :-

"31. It was submitted by the learned Senior Counsel appearing for the Revenue that the goods were classifiable under Heading 38.23 (now 38.24) as "residual products of the chemical or allied industries, not elsewhere specified or included" which was the last item covered by Heading 38.23. The said Heading 38.23 is only a residuary heading covering residual product of chemical or allied industries "not elsewhere specified or included ". In the present case since the goods were covered by a specific heading i.e. Heading 25.01, the same cannot be classified under the residuary heading at all. This position is clearly laid down in Rule 3(a) of the Interpretative Rules set out above. As per the said Interpretative Rule 3(a), the heading which provides the most specific description shall be preferred to the heading providing a more general description. This position is also well settled by a number of judgments of this Court. Reference may be made to Bharat Forge and

Press Industries (P) Ltd. v. CCE 4 . It was observed in para 4 inter alia as under: (SCC p. 534)

" 4 . The question before us is whether the Department is right in claiming that the items in question are dutiable under Tariff Entry 68. This, as mentioned already, is the residuary entry and only such goods as cannot be brought under the various specific entries in the tariff 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 cannot be had to the residuary item."

50. In our opinion 'yeast' is a chemical within the meaning of the entry in question.

51. For the views we have taken, it is not necessary for us to consider the other contentions raised by the parties.

52. For the reasons abovementioned, the impugned judgment cannot be sustained which is accordingly set aside. The appeals are allowed with costs. Counsel's fee assessed at Rs.50,000/- (Rupees fifty thousand only).