

**Read :** Application dt.14.02.2012 from M/s. Devashree Foods Pvt. Ltd., (now Dlecta Foods Private Limited) holder of TIN 27360246615V.

**Heard :** Sh. Devendra Garg, Executive Director and Smt. Rupa Gami, Chartered Accountant attended the hearing on dt.19.11.2014 and dt.17.06.2015.

## PROCEEDINGS

(under section 56(1) (e) and (2) of the Maharashtra Value Added Tax Act, 2002)

No.DDQ-11-2012/Adm-6/14/B- 4

Mumbai, dt. 29/7/15

An application is received from M/s. Devashree Foods Pvt. Ltd., having address as 36, Rajanigandha Shopping Centre, 1<sup>st</sup> Floor, Gokuldham, Goregaon (E), Mumbai-400063, seeking determination of the rate of tax on the product non-dairy whip topping sold as "DILICIA DAIRY FREE WHIP TOPPING" under invoice no.MH/T1/1516/0826 dt.08.06.2015.

### 02. BACKGROUND OF THE CASE

In the determination application, the applicant had requested for determination of the rate of tax on two products namely 'Non-dairy whip topping' and 'Beverage solution'. However, during the hearing on dt.17.06.2015, the question about 'Beverage solution' was withdrawn as currently there were no sales of the said product. Hence, only the information about the product 'Non-dairy whip topping' is being considered. To the extent of the product 'Non-dairy whip topping', the submission as made in the application is reproduced verbatim thus :

*"In respect of the above matter, we give below the facts of the case and the issues for determination under section 56 of the MVAT Act, 2002.*

1. *We are a Private Limited Company incorporated under the provisions of the Companies Act 1 of 1956 and are having our registered office at 36, Rajanigandha Shopping Centre, First Floor, Gokuldham, Goregaon (E), Mumbai 400063.*
2. *The Company is a dealer registered under the provisions of MVAT Act, 2002 as well as under the Central Sales Tax Act, 1956 and holding VAT TIN No. 27360246615V w.e.f. 1.4.2006 as well as CST TIN No. 27360246615C w.e.f. 1.4.2006.*
3. *The company holds a Permanent Account No. (PAN AAACC 2407L). The company is also registered with central excise authorities and holding Service Tax No. AAACC 2407LST001.*
4. *The company is engaged in the business of marketing and distribution of food ingredients particularly dairy and bakery ingredients. It also has a manufacturing unit for dairy and bakery ingredients. The various products dealt in include cow ghee, butter, cheese, UHT milk, milk powder, fruit fillings, dairy creams, coffee premix, beverage solution, non-dairy whip topping etc.*
5. *The company is charging tax at 5% on the products "Non-dairy whip topping" and "Beverage Solution". The company hereby applies for determining the correct rate of tax on these two products as on date.*

#### Non-dairy Whip Topping

*The product non-dairy whip topping is made out of water, edible hydrogenated vegetable oils, sugar stabilizers, caseinate, emulsifiers, buffering agents, salts and flavours'. The process of manufacture involves mixing of all the ingredients. The mixture is pasteurized and then filled. The filled packs are stored at -18 degrees centigrade.*

*The product non-dairy whip topping is used*

- 1 *in garnishing, dressing and topping of Cakes and Pastries*
- 2 *in preparing Chocolate Ganache (it is mixed to soften chocolate and keep it pasty for spreading on pastries.)*
- 3 *as an ingredient in making deserts like mousse.*
- 4 *in dressing of cold beverages like coffee etc.*
- 5 *as dressing of fruits/sweet dishes.*

We state that the product, non-dairy whip topping is an edible mixture of vegetable fat with other ingredients as referred above. Besides water, the vegetable fat forms the largest constituent of the mixture. The product is covered under Chapter-15 of the excise tariff code either as vegetable fats and oils under entry 1516 or 1517 or 1518 under the notification issued by the government under Schedule entry C-54 for industrial inputs and packing material or it would fall under entry C-102 as vegetable oil or C-100 as Hydrogenated Vegetable oil or C-30 as edible oil and therefore, chargeable to tax at the rate of 5%.

Under the harmonized codes of excise and customs, the product falls under subheading 1517 which is "Margarine; edible mixture or preparations of animal or vegetable fats or oils or of fractions of different fats or oils of this chapter, other than edible fats or oils or their fractions of heading 1516". The product specifically falls under excise tariff 15179090 which covers gel used for bakery products and bread softener. This is evidenced by a copy of bill of M/s. Rich Graviss Products Pvt Ltd., Pune, which is a pioneer unit manufacturing this product. The tariff code 15179090 is reflected in the tax invoice copy of M/s. Rich Graviss Products Pvt. Ltd.

The various entries under which the product may get covered are as follows:

Schedule Entry C-54

Tariff code:

1516 - Animal or vegetable fats and oils and their fractions, partly or wholly hydrogenated, inter-esterified, re-esterified or elaidinised, whether or not refined, but not further prepared.

1517 90 90 : Gel used for bakery products and bread softener.

1518 - Animal or vegetable fats and oils and their fractions, boiled, oxidized dehydrated, sulphurised, blown, polymerized by heat in vacuum or in inert gas or otherwise chemically modified, excluding those of heading 1516; inedible mixtures or preparations of animal or vegetable fats or oils or of fractions of different fats or oils of the chapter 15 of the Central Excise Tariff Act, 1985, not elsewhere specified or included.

C-100 Vanaspati (Hydrogenated vegetable oil)

C-102 Vegetable oil including gingill oil, castor oil and bran oil

C-30 Edible oil, edible oil in unrefined form and oil cakes excluding sarki pend

Vegetable fats have been defined as mixtures of hard fat stock and soft oil. The various uses and its capabilities have been specified in the Exhibit B which is a copy of extract on 'vegetable fats' downloaded from internet.

[www.timurnetwork.com/vegetablefats.htm](http://www.timurnetwork.com/vegetablefats.htm) -

- 1 "These are usually mixtures of hard fat stock and a soft oil.
- 2 Vegetable Bakery Shortenings: For Food Processing, Restaurant, Bakery and catering industries, house hold for making biscuits, Cakes, pastries, bread and icing.
- 3 RBD Hydrogenated palm Kernel Oil is excellent as ice-cream chocolate cevertures suitable for dips. Mainly used as dairy fat replacer in ice cream
- 4 Facilitates the use chocolate coatings for ice-cream without a high viscosity, allowing thin coatings of chocolate around the ice-cream.
- 5 Used in Chocolate and as center fat in candy bar and as coating and filler cream.
- 6 Facilitates the use chocolate coatings for ice-cream without a high viscosity, allowing thin coatings of chocolate around the ice-cream.
- 7 This product is of 100% vegetable origin and Kosher certified."

In the Supreme Court judgment reported in 45 VST 1 (SC) in the case of Aluva Sugar Agency, margarine which is manufactured out of Vegetable oils, salt, permitted emulsifiers and stabilizers and which consists mainly of fat and which is used as raw material by bakeries and those who manufacture confectionery, has been held as covered by the entry on edible oil under the Kerala Value Added Tax Act, chargeable to tax at the rate of four percent.

It has been held by the apex court in the above case that "It is not necessary that all edible things should be consumed in the form in which they are available. There are number of ingredients used in cooking for preparation of food articles which we do not consume in the same form but they are used in preparation of food articles which are consumed. So as to simplify the conclusion, we may say that normally anything which is used for preparation of a food article is edible because ultimately it is being consumed by human beings. Though one may not consume margarine directly or may not use for normal cooking, the fact is that margarine is used for preparing bakery items which are consumed by human beings and, therefore, margarine is also edible. Having around 80% fat, and being in the nature of oil, in our opinion, it should be considered as edible oil.....In our opinion, the Tribunal was right when it came to the conclusion that margarine should be taxed @ 4% as it is edible oil."

From the above Supreme Court judgment, it can be inferred that non-dairy whip topping which consists of mainly vegetable fats and which is used in bakery industry would fall under schedule entry C-100 or C-102 or C-30 or C-54 with rate of tax at 5%.

A copy of invoice for sale of the item "non-dairy Whip Topping" as also invoices for purchase of various items that go into the making of the product are enclosed herewith and marked as Exhibit 'C'."

In addition to the above, it is requested that if the determination is held contrary to the applicant's contention, the same be given a prospective effect from the date of the order.

### 03. HEARING

Sh. Devendra Garg, Executive Director and Smt. Rupa Gami, Chartered Accountant attended the hearing on dt.19.11.2014 and dt.17.06.2015. On the latter date, the submissions as made earlier were reiterated. As mentioned earlier, during the hearing on the latter date, the question about rate of tax on the product 'Beverage solution' was withdrawn. Hence, only the information as given during the hearing dt.19.11.2014 about the product 'Non-dairy whip topping' is reproduced thus :

- a) The product is used in garnishing, dressing and topping of cakes and pastries. It is also used in preparing chocolate ganache.
- b) Few ingredient such as sugar and some stabilizers and emulsifiers are mixed in water. Some stabilizers and emulsifiers are mixed in oil. After a process of mixing the two separate mixtures at different temperatures, both the mixtures are mixed together. Then the mixture is homogenized and then pasteurized and brought into a finished product tank. From here, it is filled through the finished packing machine in the packets (around 14° C to 16° C). After packing, the sealed packets are transferred to a blast freezer (-35° C) to bring it to -18° C and then shifted to a regular (Cold room) freezer with -18° C to -20° C. It is transported at this temperature.
- c) Before the product is used for application, it is thawed at 2° C to 7° C for 24 to 36 hours. Then it is to be whipped at around 7° C to 10° C. After whipping, the volume increase from 2.5 to 5 times depending upon the whipping.
- d) Claims of applicable schedule entry -
  - 1) C-54 - Industrial Input under the following Central Excise Tariff Heading -  
15179090 - *Gel used for preparing bakery products and bread softner.*
  - 2) C-100 - Vanaspati (Hydrogenated Vegetable oil).
  - 3) C-102 - Vegetable oil (including gingili oil and castor oil and bran oil)
  - 4) C-30 - Edible oil, edible oil in unrefined form and oil cakes, excluding sarki pend.
  - 5) C-54 - Industrial Input under the following Central Excise Tariff Headings -  
1518 - *Animal or vegetable fats and oils and fractions, boiled oxidized, by heat in vacuum or inert gas or otherwise chemically modified, excluding those of heading 1516.*  
1516 - *Animal or vegetable fats and oils partly or wholly hydrogenated.....*
- e) It is requested that if the claim of schedule entry as claimed applicable is not acceptable, then the order may be given prospective effect.

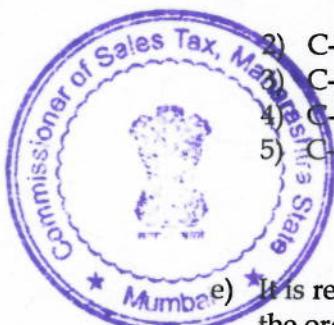
Since an assessment order under the MVAT Act,2002 was passed in respect of the period in which the invoice presented for determination fell, the applicant offered to submit a bill of an unassessed period and it was so duly tendered after the hearing. The applicant also tendered a written submission dt.19.11.2014 which states thus :

#### "Issues urged

##### Non dairy whip topping

*The ingredients of this product are water, edible hydrogenated vegetable oils, sugar, stabilizers, caseinate,*

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emulsifiers, buffering agents, salts and flavours with water and vegetable oil forming the highest component of the mixture. The product is used mainly in bakery industry for garnishing, dressing and topping of cakes and pastries, in preparing chocolate ganache, in making deserts like mousse, in dressing of cold beverages like coffee, etc.

The product is covered by either of the following notification entries under schedule entry C-54:

1. Entry 255 with excise tariff code 15179090 – Gel used for preparing bakery products and bread softener.
2. Entry 13 with excise tariff 1516 – animal or vegetable fats and oils and their fractions, partly or wholly hydrogenated, inter-esterified, re-esterified or elaidinised, whether or not refined, but not further prepared
3. Entry 14 with excise tariff 1518 – Animal or vegetable fats and oils and their fractions, boiled, oxidized, dehydrated, sulphurised, blown, polymerized by heat in vacuum or in inert gas or otherwise chemically modified, excluding those of heading 1516, inedible mixtures of preparations of fats or oils of this chapter.

The applicant had applied for Determination of the classification and rate of tax of the product under the Delhi Value Added Tax Act, 2004 and the Commissioner, Vat has passed the order dated 2/5/2013 holding the product as falling in the entry relating to Industrial inputs specified at serial no.4 under entry no.84 of III Schedule appended to DVAT Act, 2004 with rate of tax @ 5%. The entry at serial no 4 of entry no.84 of III Schedule appended to DVAT Act, 2004 is identical to the above entry 14 of excise tariff 1518.

The Commissioner in this case relied on the judgment passed in the case of M/s. Rich Graviss Products Pvt. Ltd. vs Commissioner, Commercial Taxes U.P., Lucknow (Full Bench) where the product has been held to be a preparation of fats and oils and taxable at 4%.

In the case of M/s. Rich Graviss Products Pvt. Ltd. vs Commissioner, Commercial Taxes, U.P. Lucknow (Full Bench) in 2011 NTN (Vol. 46) Tribunal 153, the appellant had placed the sample of the product "non dairy whip topping" before the H.B.T.I., Kanpur and a certificate was issued by this internationally reputed institute certifying that the product is prepared from fats and oils and the fats and oils used in this preparation are as ingredients of topping cream used in bakery and confectionary industries. The Hon'ble Tribunal held that the experts report went on to show that the product in question was a preparation of fats and oils and governed by the entry 4 of Part C of Schedule II of UP Vat Act, 2008 and was taxable at 4%. This entry is identical to entry 14 of notification to industrial input under schedule entry C-54 appended to the MVAT Act, 2002.

The Supreme Court in the case of Aluva Sugar Agency vs State of Kerala in 45 VST 1 has held that for the purpose of claiming concessional rate of tax for edible oil, margarine was to be included as edible oil since it constituted 80% of vegetable fats although it did contain other ingredients like salt, emulsifiers and stabilizers, that it is not necessary that all edible things should be consumed in the form in which they are available and there are a number of ingredients used in cooking for preparation of food articles which are not consumed in the same form but are used in the preparation of food articles which are consumed.

In view of our above contentions, the product "non-dairy whip topping" be held as falling under the schedule entry C-54 with rate of tax at 5%. Without prejudice to our contention, in case the product is considered as falling under schedule entry E-1 with rate of tax 12.5%, the order be made applicable prospectively from the date of the order."

04.

## OBSERVATIONS

I have gone through the facts of the case. The applicant has preferred to pursue the determination in respect of the product 'Non-dairy whip topping'. Hence, I would restrict my observations thereto only. To ascertain the applicable schedule entry, I would first proceed to understand the product. At the cost of repetition, but for immediate reference, the process with its ingredients and uses are reproduced thus :

### 1 Ingredients :

water, edible vegetable oil, sugar, liquid glucose, stabilisers (E464, E405, E415), caseinate, emulsifiers (E475, E471, E435, E322), acidity regulators (E331, E339(ii)), salt. Contains added nature identical flavouring substances.

### 2 Process :

- Few ingredient such as sugar and some stabilizers and emulsifiers are mixed in water. Some

stabilizers and emulsifiers are mixed in oil. After a process of mixing the two separate mixtures at different temperatures, both the mixtures are mixed together.

- Then the mixture is homogenized and then pasteurized and brought into a finished product tank. From here, it is filled through the finished packing machine in the packets (around 14° C to 16° C).
- After packing, the sealed packets are transferred to a blast freezer (-35° C) to bring it to -18° C and then shifted to a regular (Cold room) freezer with -18° C to -20° C. It is transported at this temperature.
- Before the product is used for application, it is thawed at 2° C to 7° C for 24 to 36 hours. Then it is to be whipped at around 7° C to 10° C. After whipping, the volume increases from 2.5 to 5 times depending upon the whipping.

**3. Uses :**

- in garnishing, dressing and topping of cakes and pastries
- in preparing Chocolate Ganache (it is mixed to soften chocolate and keep it pasty for spreading on pastries.)
- as an ingredient in making deserts like mousse.
- in dressing of cold beverages like coffee etc.
- as dressing of fruits/sweet dishes.

**4. Handling Instructions :**

- D'licia Whip Topping is delivered to you frozen and should be stored in freezer at -18° C or below.
- Before use, thaw under chilled refrigeration (+2° C to +7° C) for about 24-36 hours.
- Can be stored unopened at chilled temperatures for upto 14 days.
- Keep unwhipped product under refrigeration.
- Do not refreeze unwhipped product.

**5. Instructions for use :**

- Shake the carton well before opening.
- Whip at medium speed until formation of soft peaks and disappearance of shine. Whip further at increased speed to obtain the desired consistency.
- Ideal whipping temperature is +7° C to +10° C.
- Whipped products must be stored under refrigeration and can be frozen if required.
- Additional colours or flavour etc. can be added during whipping as required."

**6. Warning - Best before 12 months from manufacture when stored at -18C or below.**

**7. Warning - 'Keep refrigerated' appears about 4 times in capital letters at prominent places on the face of the pack.**

**8. Nutritional information per 100g\***

Energy (kcal)	265
Fat(g)	20.7
Protein(g)	0.3
Carbohydrates(g)	19.03
of which Sugar(g)**	16
*Approximate Value	**Sucrose

Apart from the above information given by the applicant, I have referred to the information as available on the Internet. It is learnt thus -

**puratos.com**

- Non dairy toppings and creams are a widely-used substitute to dairy creams. Industrial bakers and patissiers choose this delicious alternative, known for its superior stability that makes it ideal for fillings, coverings and decoration.
- There are two types of non-dairy toppings based on different heat treatment technologies: sterilisation and pasteurisation.
- Professional bakers use non-dairy cream for many reasons. It gives superior technical performance, versatility, profitability, nutritional benefits, great taste and all the sensory qualities customers expect.
- In research, patissiers around the world told Puratos that the five most important criteria for the selection of non dairy whipped toppings are:
  - taste

- stability
- yield
- tolerance
- smoothness
- Puratos brings you a complete range of non-dairy toppings. For European-style patisserie, we offer products like Chantypak, Whippak and Montamix. For more extensive decorations or American-style patisserie, we have Ambiante Topping and Ambiante Icing. If you're looking for un-sweetened options, Festipak and Cuisipak could be the perfect solution.

#### wisegeek.com

- Nondairy topping is a product used in place of real whipped cream in or on desserts. Nondairy topping and whipped cream are very similar in appearance and somewhat similar in taste, but the nondairy product contains none of the milk that cream has. Most people who enjoy whipped cream also like the nondairy version, although cream is often richer and the nondairy is usually sweeter.
- In most cases, nondairy topping is made from oils such as partially hydrogenated coconut and palm oil, and sweeteners such as corn syrup. Water and preservatives are also usually added. The earliest toppings were made from soy, but these were found to have a shorter shelf life than those made with oil. The partially hydrogenated oils used in most modern versions are associated with an increase in bad cholesterol due to trans fats, so these toppings are not suitable for those watching their cholesterol levels.
- Refrigerated tubs, aerosol cans, and packages of powder that cooks add milk to are the many different forms that nondairy topping is available in today. These toppings can add the finishing touch to pies, puddings and banana splits, and some people like to use them as cake fillings and frostings as well. They can be flavored with vanilla, chocolate, coconut, or many other possibilities.
- A dollop can liven up a fruit salad or gelatin, and most cafeterias use nondairy topping on their gelatin desserts. Cooks can also layer the topping with alternate layers of fruit and/or gelatin to make a parfait. Some people like it on waffles with fruit preserves or syrups. Hot chocolate with some nondairy or real whipped cream added to it is another favorite for many.
- People can use nondairy topping wherever they would use real whipped cream. A pastry bag can be used to pipe fancy-looking finishes on food or beverages for an elegant touch. While many may prefer the richness of genuine whipped cream, the nondairy variety can be more affordable and provide an option for those who don't eat dairy due to food intolerances or personal reasons. Shoppers should always read labels on products labeled as "nondairy," however, as some may contain the milk protein, casein, which is typically listed as sodium caseinate.

#### bungeindia.com

- Merricreme - Non Dairy Whip Topping (For Cakes & Pastries) - It is a premium non dairy 'ready to whip topping' prepared specially for commercial & household applications. It has an excellent freeze thaw stability. It is light, creamy in flavour, smooth in texture and has a full & rich mouth feel. It is excellent for icing on cakes, filling for pastries and topping desserts.

#### delectable.in

- About D'licia Dairy Free Whip Topping

Dairy Free Whip topping is a non-dairy cream was invented by the maker's of Rich during the Second World War to combat the shortage of dairy cream. this soybean based cream could also be whipped and as a synthetic alternative seemed to perform better with better defined peaks.

The product has good versatility allowing it to be mixed and layered with other ingredients like acidic fruits without risk of curdling or weeping. Finished products made by using dairy free topping will have longer shelf life and maintain the same shape and taste when stored at proper temperature. The dairy free topping is a mixture of water, fat added with stabilizers and emulsifier combination and produced through a mechanical process. Sugar is then added to make it a complete product in the market. Conventionally, the dairy free topping was originally sold as a frozen product but with new technology it became possible for dairy free topping in UHT packing format."

From an overview of all above, it can be seen that the impugned product is a non-dairy product used as a substitute to cream. It is in a cream form. It is used as a topping or for garnishing cakes and pastries or coffee. Having seen thus, I move on to ascertain the schedule entry as claimed applicable. I find that for the very same product, the applicant has laid claim to

a number of schedule entries. Also within the same schedule entry too, the product is sought to be classified under two to three Excise Tariff descriptions as notified for the purposes of the entry. I proceed to ascertain the claims thus :

#### [A] SCHEDULE ENTRY C-54

The entry reads thus - *"Industrial inputs and packing materials as may be notified from time to time, by the State Government in the Official Gazette"*. Under the notification for the purposes of this entry, the applicant has laid claim to the following descriptions :

i	1517 90 90	<i>Gel used for preparing bakery products and bread softener.</i>
ii	1516	<i>Animal or vegetable fats and oils and their fractions, partly or wholly hydrogenated, inter-esterified, re-esterified or elaidinised, whether or not refined, but not further prepared.</i>
iii	1518	<i>Animal or vegetable fats and oils and their fractions, boiled, oxidised dehydrated, sulphurised, blown, polymerised by heat in vacuum or in inert gas or otherwise chemically modified, excluding those of heading 1516; inedible mixtures or preparations of animal or vegetable fats or oils or of fractions of different fats or oils of the chapter 15 of the Central Excise Tariff Act, 1985, not elsewhere specified or included.</i>

As can be seen, the notification refers to the classification under the Central Excise Act. The applicant has tendered the sale invoice showing the impugned product as being cleared under the Central Excise Tariff Heading (CETH) 15179090. The applicant has also given a copy of another dealer dealing in 'Dairy free whip topping', a commodity same as the impugned product and clearing the said product under the CETH 15179090. I would ascertain the claims under each of the Excise Tariff Headings thus :

#### CETH 15179090

  
The description for the purposes of the notification against the aforementioned heading has been reproduced above. The description is very specific and notifies the following :

- 1 *the product notified is a 'gel' or in 'gel form';*
- 2 *the product is a 'gel' used for preparing bakery products and bread softener.*

Thus, the first and foremost condition is that the notification covers a 'Gel'. From the details of the impugned product as reproduced above, it can be seen that the product is not a 'gel'. However, to bring in clarity, I refer to the definition of 'gel' as appearing in Hawley's Condensed Chemical Dictionary -

*"A colloid in which the disperse phase has combined with the continuous phase to produce a viscous jelly-like product. Only 2% gelatin in water forms a stiff gel. A gel is made by cooling a solution whereupon certain kinds of solutes (gelatin) form submicroscopic crystalline particle groups which retain much solvent in the interstices (so-called "brush-heap" structure). Gels are usually transparent, but may also become opalescent."*

The word 'gel' is defined by the International Union of Pure and Applied Chemistry (IUPAC) thus -

*"Non-fluid colloidal network or polymer network that is expanded throughout its whole volume by a fluid.*  
Notes:

1. *A gel has a finite, usually rather small, yield stress.*
2. *A gel can contain:*

1. a covalent polymer network, e.g., a network formed by crosslinking polymer chains or by non-linear polymerization;
2. a polymer network formed through the physical aggregation of polymer chains, caused by hydrogen bonds, crystallization, helix formation, complexation, etc, that results in regions of local order acting as the network junction points. The resulting swollen network may be termed a thermoreversible gel if the regions of local order are thermally reversible;
3. a polymer network formed through glassy junction points, e.g., one based on block copolymers. If the junction points are thermally reversible glassy domains, the resulting swollen network may also be termed a thermoreversible gel;
4. lamellar structures including mesophases, e.g., soap gels, phospholipids and clays;
5. particulate disordered structures, e.g., a flocculent precipitate usually consisting of particles with large geometrical anisotropy, such as  $\text{InV}_2\text{O}_5$  gels and globular or fibrillar protein gels.

3. Corrected from previous definition where the definition is via the property identified in Note 1 (above) rather than of the structural characteristics that describe a gel. "

The Wikipedia describes a gel as -

*"a solid, jelly-like material that can have properties ranging from soft and weak to hard and tough. Gels are defined as a substantially dilute cross-linked system, which exhibits no flow when in the steady-state. By weight, gels are mostly liquid, yet they behave like solids due to a three-dimensional cross-linked network within the liquid. It is the crosslinking within the fluid that give a gel its structure (hardness) and contribute to the adhesive stick (tack). In this way gels are a dispersion of molecules of a liquid within a solid in which the solid is the continuous phase and the liquid is the discontinuous phase. "*

From what one understands by the above information about 'gel', it could definitely be said that the impugned product in cream form is definitely not a gel. There are gels available in the market which are gel emulsifiers, a paste form emulsifiers for cake manufacturing but the present product is not a gel. From the product packing, it can be seen that the impugned product comes in a cream form. It is used as a topping or decoration. The website of the applicant describes the product uses as being "*Whip Toppings for Cakes and Desserts. Coffee bars for whitening and garnishing*". On the website [www.delectable.in](http://www.delectable.in), "D'licia Dairy Free Whip Topping" is described thus :

*"D'licia Dairy Free Whip Topping Cream can be whipped with additional ingredients like various types of sugar including powdered and liquid also water and dairy products including cream and milk.*

*D'licia Dairy Free Whip Topping is 100% vegetarian. It is ideal for use as icing or layering of cakes & pastries, topping of desserts or even as a basic ingredient in desserts. It brings out the best in your cakes and desserts – visual appeal, great taste and longer shelf life. It is economical to use D'licia Dairy Free Whip Topping as it can be whipped upto almost four times its volume. This versatile whipping cream can be mixed and layered with other ingredients like acidic fruits without the risk of curdling or weeping. Finished products made using D'licia Dairy Free Whip Topping have longer shelf life and maintain the same"*

It can be inferred from the above that the impugned product is basically a cream which is used for layering or topping whereas the description for concessional rate of tax is "*Gel used for preparing bakery products and bread softener*". From the information as available on the Net, it can be seen that gels are used in bakery products for various reasons such as texture, quality, reduction of fat content and such other reasons. Bread softener keeps the bread soft and moist, more commonly referred to as the *emulsifier*, is an additive, for example lecithin (an extract from the soy bean), which binds with the water and fat in the dough, to stabilize the mixture. It improves crumb and the slicing behavior of the bread, and enhances a sense of freshness', i.e. the springiness of the finished bread. We have seen the impugned product and it cannot escape

attention that it has a specific and defined utility which is not comparable with the gels used in bakery products and bread softeners. Since it is not a gel, it need not be ascertained as to whether it is used in preparing bakery products and bread softener. The product is also not a bread softener. But one thing has to be observed that the description as notified covers products which are used as raw materials in the preparation of the final products. They would not be directly edible but such is not the case with the present product as it is used as a topping, as an icing, as a dressing of fruits/sweet dishes and therefore, can be eaten directly.

In view of above, the following inferences about the impugned product are very inevitable :

1. *The impugned product is not a gel. It is not in gel form.*
2. *It is not a gel used for preparing bakery products and bread softener.*
3. *It is a cream.*
4. *It is used as a topping or decoration.*

The position being so, the impugned product does not fit into the description as has been notified for the purposes of the schedule entry C-54 of the MVAT Act,2002 against the CETH 15179090. A point to be noted is that the description under Central Excise is not the same as the one under the notification. This can be seen from the following :

1517	Margarine; edible mixture or preparations of animal or vegetable fats or oils or of fractions of different fats or oils of this chapter, other than edible fats or oils or their fractions of heading 1516
<hr/>	
1517 90 90	--- Other

It can be seen that instead of the description "Other" as notified under the Central Excise Tariff, the MVAT Act,2002 has sought to notify only "*Gel used for preparing bakery products and bread softener*" for concessional rate under the schedule entry C-54 of the Act. And we have seen above that the impugned product does not satisfy the description as has been notified against the CETH 15179090 for the purposes of the notification under the schedule entry for 'Industrial inputs and packing material'. In view thereof, the claim against CETH 1517 as notified for the purposes of the MVAT Act,2002 is not tenable.

#### CETH 1516

The first and foremost thing to be noted is that the applicant is tendering a bill showing excise classification under CETH 15179090 and further informing that other manufacturers are also clearing the goods under the same classification. It need not be proved that no two excise Headings could be the same. Each Heading has a distinct class as falling under the said Heading. And hence, the descriptions under two separate Headings would not, by any measure, be applicable to the same commodity. *Despite the same, the applicant is putting forth a view that the impugned product falls under other Excise Headings too!* The argument is inherently fallacious. Nevertheless, I would deal with the same.

The description as notified against CETH 1516 is -

*Animal or vegetable fats and oils and their fractions, partly or wholly hydrogenated, inter-esterified, re-esterified or elaidinised, whether or not refined, but not further prepared.*

We have seen the ingredients of the impugned product as being *water, edible vegetable oil, sugar, liquid glucose, stabilisers (E464, E405, E415), caseinate, emulsifiers (E475, E471, E435, E322), acidity regulators (E331, E339(ii)), salt and added nature identical flavouring substances*. If we look at the above description, we see that the description covers vegetable fats and oils but the closing words of the description restrict the vegetable fats and oils to those which have not been further prepared. The impugned product is certainly not 'vegetable fats and oils and their fractions' *per se*. Further, the above description against CETH 1516 of 'vegetable fats and oils and their fractions' would not include products as including sugar, glucose or salt or nature flavours.

A look at some of the instructions on the packing of the product, as reproduced below, also endorses that the impugned product is not 'vegetable fats and oils and their fractions' *per se* :

- *Before use, thaw under chilled refrigeration (+2°C to +7°C) for about 24-36 hours.*
- *Keep unwhipped product under refrigeration.*
- *Do not refreeze unwhipped product.*
- *Whip at medium speed until formation of soft peaks and disappearance of shine. Whip further at increased speed to obtain the desired consistency.*
- *Ideal whipping temperature is +7°C to +10°C.*
- *Whipped products must be stored under refrigeration and can be frozen if required.*
- *Additional colours or flavour etc. can be added during whipping as required.*

The impugned product not being 'vegetable fats and oils and their fractions' can also be conformed from the applicant's behaviour in clearing the impugned product under the CETH 1517. I have reproduced the said Tariff description above. It covers "*Margarine; edible mixture or preparations of animal or vegetable fats or oils or of fractions of different fats or oils of this chapter, other than edible fats or oils or their fractions of heading 1516*". The impugned product is used as a topping on cakes and pastries and hence falls in the edible category. As can be seen the Heading 1517 covers '*edible mixture or preparations of animal or vegetable fats or oils or of fractions of different fats or oils of this chapter*'. The present product is not vegetable oil or fat *per se* but as the ingredient list shows '*edible vegetable oil*' alongwith other ingredients is used in the making of the impugned product. Thus, it is seen that it is a mixture or preparation made from edible vegetable oil, one of the ingredients of the impugned product. Hence, it could be reasoned out as to why the impugned product has been cleared under the CETH 1517 which covers "*edible mixture or preparations of animal or vegetable fats or oils*". The impugned product neither being 'vegetable fats and oils and their fractions' but a preparation made from edible vegetable oil and other ingredients and further too, nor being cleared under the CETH 1516, it can be reasonably concluded that the claim under CETH 1516 is not tenable.

#### CETH 1518

While ascertaining the claim under the CETH 1518, it should again not be lost sight of the fact that the applicant is clearing the impugned product under the CETH 1517. At the cost of

repetition, but for ready reference, the description against the Heading 1518 could be seen thus -

*"Animal or vegetable fats and oils and their fractions, boiled, oxidised dehydrated, sulphurised, blown, polymerised by heat in vacuum or in inert gas or otherwise chemically modified, excluding those of heading 1516; inedible mixtures or preparations of animal or vegetable fats or oils or of fractions of different fats or oils of the chapter 15 of the Central Excise Tariff Act, 1985, not elsewhere specified or included."*

As can be seen, the above Heading covers -

1. *vegetable fats and oils and their fractions*
2. *inedible mixtures or preparations of vegetable fats and oils and their fractions*

We have seen above that the impugned product is not vegetable fats and oils and their fractions, *per se*. As regards the other requirement about '*inedible mixtures or preparations of vegetable fats and oils and their fractions*', then the applicant himself answers this question when we see the uses [in garnishing, dressing and topping of cakes and pastries, etc.] or the nutritional information [Energy (kcal)-265, Fat(g)-20.7, Protein(g)-0.3, etc.] as has been advertised on the packing of the product. I have reproduced the same above on page 5 of this order. Further, we have also seen the description on the website saying thus :

*"It is ideal for use as icing or layering of cakes & pastries, topping of desserts or even as a basic ingredient in desserts. It brings out the best in your cakes and desserts – visual appeal, great taste and longer shelf life. .... This versatile whipping cream can be mixed and layered with other ingredients like acidic fruits without the risk of curdling or weeping. Finished products made using D'licia Dairy Free Whip Topping have longer shelf life..."*

All the above confirms that the impugned product can be consumed and is therefore, not an inedible mixture or preparation. Therefore, the inevitable inferences follow that the impugned product is :

1. *not vegetable fats and oils and their fractions, per se;*
2. *not an inedible mixtures or preparations of vegetable fats and oils and their fractions. It is, in fact, an edible preparation made from edible vegetable oil and other ingredients.*

The above inferences place the impugned product out of the scope of the CETH 1518. In view thereof, it can be concluded that the claim under CETH 1518 is not tenable.

I would now deal with the claim laid as to the other schedule entries under the MVAT Act, 2002.

#### [B] SCHEDULE ENTRY C-100

The schedule entry C-100 reads thus -"Vanaspati (Hydrogenated vegetable oil)"

The above entry covers -"Vanaspati" which is a cooking medium in India. It cannot be consumed directly. We have seen above that the impugned product with ingredients such as sugar, glucose or salt or nature flavours is not vegetable oil *per se*. It is a preparation made from edible vegetable oil and other ingredients. Despite the facts being so, the applicant lays claim as to the product being a hydrogenated vegetable oil. It is important to note that the impugned

product cannot be put to the same use as a hydrogenated vegetable oil. The Hon. Supreme Court in M/s. Punjab Aromatics (Civil Appeal No. 3160 of 2008 dt.30.04.2008) has discussed about the '*test of irreversibility*'. In this case, the Hon. Supreme Court took consideration of the Tribunal's finding that despite adding impurities to the sandalwood oil, the product could become red oil again and therefore, it was held that it cannot be said that red oil and sandalwood oil are two separate and distinct products. The impugned product has been made from edible vegetable oil which is one of the ingredients alongwith *water, sugar, liquid glucose, stabilisers (E464, E405, E415), caseinate, emulsifiers (E475, E471, E435, E322), acidity regulators (E331, E339(ii)), salt and added nature identical flavouring substances*. In the present case, by adding these ingredients, the product does not remain the edible vegetable oil.

I would cite herein the case of Hellios Food Additives Private Limited v. State of Karnataka (132 STC 47). The Hon. Karnataka High Court was faced with the question of whether the commodity sold under the brand name "Lite-N-Soft Gel" could be held to fall in the category of "chemicals" or "hydrogenated edible oil" or remains as an unclassified goods. The observations on the lines of distinct commodities and dealing with the claim of hydrogenated oil are worth referring to :

"Furthermore, "gel" manufactured by the assessee, may have fats as one of its nutrient component but that by itself can hardly be of any consequence in classifying it in one or the other entry of the statute like the Act. All edible substances will have "fats" in varying percentages. This can hardly be a ground for classifying goods for taxing purposes. The courts have taken the view that even ice and water, which have the same and exact chemical composition, i.e., two atoms of hydrogen and one atom of oxygen, are commercially different commodities for the purpose of taxing statute. There cannot be a better illustration than this to demonstrate the fallacy in identifying the commodity by basing the reasoning on chemical compositions, and similarly the nutrient value of edible goods.

Further, the emulsifying agents and stabilising agents have been defined in rule 60 of the Prevention of Food Adulteration Rules, 1955 (in short, "the Rules"). These are defined to mean "substances which, when added to food, are capable of facilitating a uniform dispersion of oils and fats in aqueous media, or vice versa, and/or stabilising such emulsions". Rule 61 of the Rules puts restriction on use of emulsifying or stabilising agents in any food, except where the use of emulsifying or stabilising agent is specifically permitted. The second proviso to rule 61 provides that polyglycerol esters of fatty acids and polyglycerol ester of interesterified ricinoleic acid may be used in bakery products and in chocolate to the extent of 0.2 per cent by weight. This proviso also shows that "gel" which is an emulsifying agent is an article of established and independent identity and cannot be classified as either chemical or hydrogenated oil.

**It may also be noticed here that for long hydrogenated oil has acquired definite identity.** In the case of Tungabhadra Industries Ltd. v. Commercial Tax Officer [1960] 11 STC 827 the Supreme Court has held that hydrogenated oil is prepared from refined oil by the process of passing hydrogen into heated oil in the presence of a catalyst (usually finely powdered nickel), two atoms of hydrogen are absorbed. A portion of the oleic acid which formed a good part of the content of the groundnut oil in its raw state is converted, by the absorption of the hydrogen atoms, into stearic acid and it is this which gives the characteristic appearance as well as the semi-solid condition which it attains. The "gel", manufactured by the assessee, nowhere fits in with the process of manufacturing hydrogenated edible oil. **For that matter, the "gel" can never be used for cooking purpose in the kitchen.**"

Drawing parallels from the above, it can be seen that the impugned product is also a commercially distinct commodity and is known in the market as a 'whip topping'. And what is hydrogenated oil is a settled issue. Therefore, as in the said case of 'gel', the product 'whip topping' in the present proceedings before me could not be said to be "Vanaspati (Hydrogenated vegetable oil)" as specified in the schedule entry C-100.

Further, if we see that edible vegetable oil is one of the ingredients then could the final  
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product be a hydrogenated vegetable oil wherein the edible vegetable oil has been mixed with other ingredients and the mixture is made to go through processes at controlled and precise temperatures and also has been subjected to whipping? Vanaspati (Hydrogenated vegetable oil) is not used as an icing or topping on cakes and pastries or for garnishing. Further, it doesn't come in a cream form. Even further, we also see that Vanaspati (Hydrogenated vegetable oil) is not put to use or processes as follows -

- Before the product is used for application, it is thawed at 2° C to 7° C for 24 to 36 hours. Then it is to be whipped at around 7° C to 10° C.
- Uses thus - in garnishing, dressing and topping of cakes and pastries, in preparing Chocolate Ganache, as an ingredient in making deserts like mousse, in dressing of cold beverages like coffee etc., as dressing of fruits/sweet dishes.
- D'licia Whip Topping is delivered to you frozen and should be stored in freezer at -18° C or below.
- Before use, thaw under chilled refrigeration (+2° C to +7° C) for about 24-36 hours.
- Can be stored unopened at chilled temperatures for upto 14 days.
- Keep unwhipped product under refrigeration.
- Do not refreeze unwhipped product.
- Whip at medium speed until formation of soft peaks and disappearance of shine. Whip further at increased speed to obtain the desired consistency.
- Ideal whipping temperature is +7° C to +10° C.
- Whipped products must be stored under refrigeration and can be frozen if required.
- Additional colours or flavour etc. can be added during whipping as required.
- The product has good versatility allowing it to be mixed and layered with other ingredients like acidic fruits without risk of curdling or weeping. Finished products made by using dairy free topping will have longer shelf life and maintain the same shape and taste when stored at proper temperature.
- It is ideal for use as icing or layering of cakes & pastries, topping of desserts or even as a basic ingredient in desserts. It brings out the best in your cakes and desserts – visual appeal, great taste and longer shelf life. It is economical to use D'licia Dairy Free Whip Topping as it can be whipped upto almost four times its volume. This versatile whipping cream can be mixed and layered with other ingredients like acidic fruits without the risk of curdling or weeping. Finished products made using D'licia Dairy Free Whip Topping have longer shelf life and maintain the same

In view of all above, the claim under this schedule entry should not sustain.

[C] SCHEDULE ENTRY C-102

[D] SCHEDULE ENTRY C-30

The above schedule entries read thus -

C-102 - Vegetable oil including gingili oil, castor oil and bran oil

C-30 - Edible oil, edible oil in unrefined form and oil cakes, excluding sarki pend

The same discussion as had in schedule entry C-100 applies to the claim with regard to both the above schedule entries, too. The impugned product is neither 'vegetable oil' nor 'edible oil' *per se*.

The Hon. Supreme Court's observations in Pio Food Packers (46 STC 63) would help us understand that even though edible vegetable oil is an ingredient of the impugned product, the mixing of it with other ingredients and the various processes engaged in before and after manufacture would render the edible vegetable oil and other ingredients being transformed into a new commodity. In short, the final product would not be the edible vegetable which was initially used. The Hon. Supreme Court observed thus -

*"There are several criteria for determining whether a commodity is consumed in the manufacture of another. The*

generally prevalent test in whether the article produced is regarded in the trade by those who deal in it, as distinct in identify from the commodity involved in its manufacture. Commonly, manufacture is the end result of one or more processes through which the original commodity is made to pass. The nature and extent of proceeding may vary from one case to another, and indeed there may be several stages of processing and perhaps a different kind of processing at each stage. With each process suffered, the original commodity experiences a change. But it is only when the change, or a series of changes, take the commodity to the point where commercially it can no longer be regarded as the original commodity but instead is recognised as a new and distinct article that a manufacture can be said to take place. Where there is no essential difference in identify between the original commodity and the processed article it is not possible to say that one commodity has been consumed in the manufacture of another. Although it has undergone a degree of processing, it must be regarded as still retaining its original identity."

By application of common parlance test as well as commercial parlance test as propounded by the Hon. Courts, the claims made by the applicant about the impugned product being an edible oil or a vegetable oil or a Vanaspati ((Hydrogenated vegetable oil) would not survive. The legislature could never have intended to cover a product which is a preparation containing *edible vegetable oil, water, sugar, liquid glucose, stabilisers (E464, E405, E415), caseinate, emulsifiers (E475, E471, E435, E322), acidity regulators (E331, E339(ii)), salt and added nature identical flavouring substances* to be a Vanaspati (Hydrogenated vegetable oil) of entry C-100 or a Vegetable oil of entry 102 or an Edible oil of entry C-30. One important thing to be noted in respect of all the claims discussed above is the very precision which is insisted to be maintained in all the processes which go into the making of the impugned product and after the product has been manufactured or even before it is being put to use. The insistence on maintaining the precise temperatures should not go unnoticed. Such are not the circumstances for the various descriptions under which claim has been laid to. Edible oil or vegetable oil is not used as an icing or topping on cakes and pastries or for garnishing. Further, it doesn't come in a cream form. Edible oil or vegetable oil also does not require to maintain the temperature which has been insisted upon. And the most important thing, the thawing and whipping before putting the impugned product into use are never a requirement of any of the above descriptions. Therefore, claims under these entries are inherently fallacious.

Having discussed the claims regarding the applicable schedule entries, I conclude that for reasons as discussed above, none of the claims are found proper. There is no specific schedule entry which could be said to cover the impugned product. In view thereof, the impugned product would be placed in the residuary schedule entry E-1 of the MVAT Act,2002, thereby liable to tax @12.5%.

## 05. ARGUMENTS

I would now discuss the arguments made while laying claims to the aforesaid schedule entries.

The reliance on the article about '*Vegetable fats*' would not be useful as the impugned product is not '*vegetable fat*' *per se*.

The applicant has relied on the Hon. Supreme Court decision in the case of Aluva Sugar

Agency (cited supra). The product therein was 'margarine' which is not similar to the product in the present proceedings. Even then, I would deal with the arguments as made such that the ratio in the said case would apply to the facts of the present case. The issue before the Hon. Court was whether margarine can be treated as edible oil and thus, falling under the entry of the Kerala Act for 'Edible oil'. There was yet another entry under the said Act which provided for '*Oils, edible or inedible including refined or hydrogenated oils and margarine not elsewhere mentioned in this Schedule or in the Second Schedule*'. The Hon. Court observed that -

*"...that normally anything which is used for preparation of a food article is edible because ultimately it is being consumed by human beings. Though one may not consume margarine directly or may not use for normal cooking, the fact is that margarine is used for preparing bakery items which are consumed by human beings and, therefore, margarine is also edible. Having around 80% fat, and being in the nature of oil, in our opinion, it should be considered as edible oil."*

The facts of the present case are not the same. The product in the present proceedings before me is not 'margarine'. It is a distinct product available in cream form and is known as a 'non-dairy whip topping'. Thus, the product and issue before the Hon. Supreme Court was *whether the BISBRI brand of bakery margarine sold by the appellant is as an edible oil?* The aforesaid decision recorded an observation of the Tribunal that -

*"According to New Webster's Dictionary, margarine is "a substitute for butter consisting of a mixture of prepared edible fats extracted from vegetable oils, and treated with lactic acid bacilli. According to Chambers Twentieth Century Dictionary, margarine is "any imitation butter". According to Concise Oxford Dictionary, margarine is "butter substitute made from edible oils and animal fats with milk"."*

The Hon. Apex Court recorded the observations of the Hon. High Court with regard to product description thus -

*"The product description of Respondent's product in the leaflet further shows that the item is enriched with vitamin A and vitamin D and also contains permitted emulsifiers and stabilizers. ."*

The Hon. Apex Court also described the product thus -

*"The product dealt with by the appellant is bakery margarine. Photocopies of the labels affixed on the container of margarine manufactured by a few companies have been placed on record. The first one is the label of BISBRI bakery margarine. It is stated in the label that the said margarine is made from vegetable oils only and that it is enriched with vitamins A and D and is made from any or all of the following permitted ingredients: "refined and/or hydrogenated sunflower, soyabean, cottonseed, palmoline, palm and sesame oils, salt, permitted emulsifier and stabilizers".*

As mentioned earlier, the impugned product is not the same as the one in the aforesaid case. We have seen the ingredients of the impugned product. It is not edible vegetable oil *per se*. It is made using edible vegetable oil as one of its ingredients alongwith *water, sugar, liquid glucose, stabilisers (E464, E405, E415), caseinate, emulsifiers (E475, E471, E435, E322), acidity regulators (E331, E339(ii)), salt and added nature identical flavouring substances*. In the present case, a new product with a distinct identity and a very defined use has come into existence by the coming together of the ingredients and the processes applied thereto, not to mention the precision of the temperatures to be maintained at every stage. The Hon. Supreme Court in Chowgule & Co. Pvt. Ltd. (1 SCC 653 1981) has observed that *where any commodity is subjected to a process or treatment with a view to its development or preparation for the market, it would amount to processing*. On the basis of this logic, the

Hon. Supreme Court in another case of B. P. Oil Mills Ltd (111 STC 188 SC) held that *the nature and extent of the process to which the crude oil is subjected to make it refined oil brings the latter within the meaning of the expression goods 'manufactured'*. If the facts of the present case are seen then the impugned *non-dairy whip topping* is a distinctly different product than the '*vegetable fats and oils*' or '*edible oil*' or '*Vanaspati*'. A customer requiring an edible oil or vegetable oil or a Vanaspati would not accept the present product which is in a cream form. The present product has a different market and use than an edible oil or vegetable oil or a Vanaspati. When the Hon. Supreme Court has held that crude oil is different than a refined oil, it shouldn't be much hard to infer that a combination of various ingredients such as *edible vegetable oil, water, sugar, liquid glucose, stabilisers (E464, E405, E415), caseinate, emulsifiers (E475, E471, E435, E322), acidity regulators (E331, E339(ii)), salt and added nature identical flavouring substances* and the processes thereon involving acute precision would not make the impugned product to still remain as the edible vegetable oil which was just one of the many ingredients used therein. Further, if we see the Vegetable Oil Products (Regulation) Order, 1998, then one finds separate definitions thus :

- (b) "*bakery shortening*" means *Vanaspati* meant for use as a shortening or leaving agent in the manufacture of bakery products, that is, for promoting the development of the desired cellular structure in the bakery product with an accompanying increase in its tenderness and volume;
- (c) "*blended edible vegetable oil*" means an ad-mixture of two or more edible vegetable oils;
- (ga) "*mixed fat spread and vegetable fat spread*" means emulsion of edible oils and fats excluding animal body fats, with water as under:
- (gb) '*mixed fat spread*' means a mixture of milk fat with any one or more of hydrogenated, unhydrogenated refined vegetable oils or interesterified fat.
- '*Vegetable fat spread*' means a mixture of any two or more of hydrogenated, unhydrogenated refined vegetable oils or interesterified fat.
- (h) "*margarine*" means an emulsion of edible oils and fats with water;
- ia) "*refined vegetable oil*" means any vegetable oil which is obtained by expression of vegetable oil bearing materials deacidified with alkali and/or by physical refining and / or by miscella refining using permitted food grade solvents followed by bleaching with adsorbent earth and / or activated carbon and deodorised with steam without using any chemical agents.
- (n) "*vanaspati*" means hydrogenated vegetable oil meant for human consumption ;
- (o) "*vegetable oil product*" means any product obtained for edible purpose by subjecting one or more edible oils to any or a combination of any of the process or operations namely, refining, blending, hydrogenation or interesterification and winterisation (process by which edible fats and oils are fractionated through cooling), and includes any other process which may be notified by the Central Government in the Official Gazette.

The present product does not fit under any of the above descriptions. It is a distinct product made from edible vegetable oil and other ingredients and is not vegetable oil *per se*. In view of all above, the reliance on the judgment in Aluva Sugar Agency (cited supra) is not justified as the present product is not at par with the product decided therein and hence the said ratio cannot be applied to the facts of the case before me.

And I find that there is a direct case law of the Hon. Andhra Pradesh High Court in the case of Rich Graviss Products Pvt. Ltd. (57 VST 78 AP 2013), the dealer whose sale invoice, the applicant has submitted to show that other dealers also classify non-dairy whip topping under CETH 1517. The product in this case was a combination of water, edible vegetable fat, sugar,

emulsifiers, soy protein concentrates, stabilizers, acidity regulators, salt as also natural and artificial flavouring substances. It was stressed out by the Petitioner therein that the said product is prepared from out of edible vegetable oils. The Hon. High Court held that the claim of coverage of the said product under the description as given under the Andhra Pradesh Value Added Tax Act against the CETH 1518 (Animal or vegetable fats boiled, oxidized, dehydrated, sulphurized, blown, polymerized by heat in vacuum or in inert gas or otherwise chemically modified; inedible mixtures or preparations of fats and oils of this chapter) was misconceived. The Hon. High Court expressed agreement to the Tribunal's observation that individually the ingredients of the product in question may fall under entry 100 (*the following goods when sold as industrial inputs...*) of Schedule IV to the VAT Act and may be eligible to be taxed at four per cent. But when once all the ingredients are mixed together, the product in question emerges, and therefore, the product which is a combination of the above ingredients cannot be said to fall under entry 100 of Schedule IV to the VAT Act. With regard to the Petitioner's submission that the product is an industrial input, the Hon. Court observed thus :

*"Even according to the petitioner, it manufactures the product in question from out of vegetable oils and fats and the ingredients of it are water, edible hydrogenated oils, sugar, emulsifiers, soy protein concentrates, stabilizers, buffering agents and salt. The product is outcome of the process of emulsification, pasteurization, homogenization, chilling and ageing of the combination of solution of sugar and hydrogenated vegetable oils. Further, the case of the petitioner is that the product in question cannot be consumed directly by anyone and it can be used only in making bakery products and in hotel industry, as such, it is an industrial input and/or raw material and falls under entry 100(4) of Schedule IV to the VAT Act."*

*The petitioner placed a document (chart) showing the process of making the product. The said process shows that there are more than a dozen stages in making the product. However, the raw material means "any substance, in its natural unprocessed state that serves as the starting point for a production or manufacturing process". But, the product in question is a combination of different ingredients, viz., water, edible vegetable fat, sugar emulsifiers, and soy-protein concentrates, stabilizers, acidity regulators, salt and also contains natural and artificial flavour substances. In view of the same, it cannot be said that the product is a raw material and/or industrial input."*

Thus, the Hon. Court did not consider it as an industrial input. And one important thing to be not missed out is that entries for "Vegetable oils - All kinds of vegetable oils including solvent oils and Coconut oil" as well as for "Vanaspathi, Hydrogenated Vegetable Oil" were very much available under the Andhra Pradesh VAT Act. However, there was neither a claim thereto by the Petitioner nor a consideration thereof by the Hon. Court as being entries under which the product "Rich's Whip Topping" could be considered for classification. This assumes significance when we see that the applicant is relying on the treatment meted out to a product same as the impugned product by the very Petitioner in the aforesaid case, namely Rich Graviss. The product was accordingly held liable to tax @12.5% under the residuary Schedule.

There is yet another decision in Sagar Sons v. Commissioner, Commercial Tax, Uttarakhand, Dehradun (35 VST 76 UTT 2010) wherein the product before the Hon. Uttarakhand High Court was 'whip topping'. It was claimed therein that the said product is *primarily a vegetable oil which oil which is mixed with sugar and water and emulsified in semi-solid form which is then used as an icing in bakery products, such as, cakes and pastries*. Before the determining authority,

it was claimed that the "whip topping" is a semi liquid form of the vegetable oil and is used as decoration of cakes and pastries and cannot be consumed directly and therefore it is an "industrial input" which is used in manufacturing/decoration of cake and pastries. However, both in assessment and determination, it was held that the product "whip topping" shall be taxed at the rate of 12.5 per cent, as it is an "unclassified product". In appeal, the same grounds that "whip topping" is manufactured from the basic products such as edible oil, water and emulsified agents and, therefore, it has to be taken as a product under the heading of "edible oil" were taken. The Tribunal, however, rejected the appeal on the ground that *since the ingredients of "whip topping" are water, edible vegetable fat, hydrogenated edible oil, emulsifier, it cannot be called only an edible oil nor can be categorised as such. Moreover, this item is not classified under any heading of the Act and the Schedule given therein and, therefore, it has to be taxed as an unclassified item, for which a tax at the rate of 12.5 per cent is liable to be charged.* The further contention that the product "whip topping" has to be treated as an "industrial product" was also not accepted by the Tribunal, as there was no such category under the Act. In appeal, the Hon. Court observed thus -

*"In the considered opinion of this court, the contentions of the revisionist are wholly misplaced. Although it is by now settled that in case an entry can be reasonably placed in a "classified category", then it should not be relegated to the orphanage clause of an unclassified category and should be taxed as per the classified category given in the Schedule of the taxing statute, but the reverse being equally true is that in case there cannot be a reasonable classification of a product or in other words, it cannot be reasonably placed anywhere as a classified item, then it must be placed in the unclassified category. In the present case, the product "whip topping" cannot be classified as a vegetable oil or any other item as contended by the revisionist, so as to put "whip topping" under the category of tax at the rate of four per cent. The learned counsel for the revisionist could not convince this court that the product "whipping top" can be placed anywhere in the Schedule in order to be taxed at the rate of four per cent. Admittedly, "whipping top" is not an item mentioned exclusively as such in the Schedule. Therefore, it being an unclassified item has to be charged tax at the rate of 12.5 per cent. Moreover, fiscal matter has to be strictly interpreted, if the Legislature of the State in its wisdom has decided that the "whip topping" has to be treated as unclassified item, then it has to be treated as such. The court cannot impose either its opinion or wisdom on this aspect."*

In the above case also, specific entries for "edible oils", "Vanaspati (hydrogenated vegetable oil)" and "Vegetable oil including gingili oil and bran oil" were in existence under the Uttarakhand VAT Act. However, as was the view of the Hon. Andhra Pradesh High Court, the Hon. Uttarakhand Court, too, did not consider the claims to the aforesaid entries as being reasonable.

Thus, it can be seen that both the Hon. High Courts have not considered "non-dairy whip topping" as a vegetable oil or an edible oil but have relegated it to the confines of the residuary schedule entry being an unclassified item. The situation remains the same when we consider the position under the MVAT Act,2002.

Having discussed the non-applicability of the Hon. Supreme Court to the facts of the present case and further the existence of judgments of the Hon. High Courts on the similar product, there shouldn't remain any further arguments in the matter. However, I find that the applicant has relied on certain other decisions, too. Nevertheless, I prefer to deal with the same.

The applicant refers to a determination order dt.02.05.2013 under the Delhi Value Added Tax Act in the case of the applicant himself wherein it has been held that "non-dairy whip

topping" used as a bakery ingredient for dressing/ topping, ingredients, garnishing and filling of desserts like cakes, pastries, mouse and also in some beverages like cold coffee etc. The Hon. Commissioner held that the said product is an industrial input under the description which is the same as the one for the CETH 1518 as reproduced by me hereinearlier. The description, for ready reference, reads thus -

*Animal or vegetable fats and oils and their fractions, boiled, oxidised dehydrated, sulphurised, blown, polymerised by heat in vacuum or in inert gas or otherwise chemically modified, excluding those of heading 1516; inedible mixtures or preparations of animal or vegetable fats or oils or of fractions of different fats or oils of the chapter 15 of the Central Excise Tariff Act, 1985, not elsewhere specified or included.*

The decision was so taken as there was a decision of the Commercial Taxes Tribunal, Uttar Pradesh, Lucknow (Full Bench) in the case of Rich Graviss Products Pvt. Ltd. whereunder the commodity "Rich Whip Topping non-dairy cream" was held as falling under the description which is the same as the one for the CETH 1518 as reproduced hereinabove. I have perused the Tribunal's decision. It is dated 08.07.2011 whereas the Hon. Andhra Pradesh High Court decision in Rich Graviss Products Pvt. Ltd. (cited supra), involving the very product, is of dt.30.12.2011. The decision of the Hon. Uttarakhand Court in Sagar Sons (cited supra) is of an earlier date, dt.01.07.2010. I find that the same has not been considered by the Commercial Taxes Tribunal, Uttar Pradesh. Also, both the above decisions were not under consideration of the Hon. Commissioner, Delhi VAT Act. Coming to the decision of the said Tribunal, then, it is seen that the decision was given on the basis of a report of H.B.T.I., Kanpur that the product is prepared from fats and oils. The fats and oils used in the preparation are as ingredients of topping cream, which is used for bakery and confectionary industries. Since, the product was a preparation of fats and oils, it was held that the same was covered by the description same as the one against the CETH 1518 reproduced hereinabove. At the outset, when there are decisions of the Hon. Courts, reliance on the decision of the Commercial Taxes Tribunal, Uttar Pradesh would be uncalled for. Nevertheless, I need to point out that the report of H.B.T.I., Kanpur was that the product is prepared from fats and oils. The report did not say that the product is covered by the description under CETH 1518. In the present case, too, edible vegetable oil is one of the ingredients. So the present product is also a preparation from oil. However, to classify under CETH 1518, it should be an *inedible mixture or preparation of animal or vegetable fats or oils or of fractions of different fats or oils of the chapter 15*. And we have seen that such is not the case as the impugned product is used to garnish or decorate or as a topping on cakes, desserts and it is inevitable that the same would be consumed alongwith the edible item which has been so garnished or topped with the impugned cream topping. Further, we have been informed that the impugned product is cleared under CETH 1517. Therefore, the aforesaid points need a consideration while dealing with the claim as regards the description as appearing for the CETH 1518. However, it appears that cognizance of the same has not been taken. The determination order and the Commercial Taxes Tribunal's decision are not binding on me and moreso, in a case where direct decisions of

the Hon. High Courts on the very product are available.

An overview of all above, I find that the arguments made in favour of the product being covered by the various entries under Schedule C of the MVAT Act,2002 lack in merits.

#### 06. PROSPECTIVE EFFECT

The applicant has requested for prospective effect from the date of the order in case the contentions as to the schedule entries are not found acceptable. It is well laid down that a request for prospective effect is to be measured on the basis of the available provisions, the attending circumstances as also as to the scope of any mis-interpretation, ambiguity or mis-guidance. None of the aforesaid could be said to be a cause in the instant case before me. We have seen above that the description against CETH 15179090 as notified was clear. Of the very many things that fell under the said CETH, the legislature sought to cover only the items as were notified. The impugned product was not a gel and neither a bread softener. Therefore, there should not have been any difficulty in understanding that the impugned product does not fit under the said description. As regards claims in respect of CETH's 1516 and 1518, the same were not tenable in the first place when the applicant is clearing the impugned product under CETH 1517. No two Tariff classifications could be similar and therefore, the same product could never satisfy the description for the purposes of three Tariff Headings at the same point of time. Apart from that, we have seen that one of the Headings covered "*animal or vegetable fats and oils, partly or wholly hydrogenated, inter-esterified, re-esterified or elaidinised, whether or not refined, but not further prepared*" (1516) while the other covered "*edible mixtures or preparations of fats and oils*" (1518). The impugned product is a preparation made from edible vegetable oil, water and other ingredients. As regards claims to other schedule entries such as edible oil, vegetable oil and Vanaspati (Hydrogenated vegetable oil), it was very much understood that the impugned products are not edible/vegetable oil or Vanaspati *per se*. The applicant when placing reliance on the Excise classification of a similar product by a certain other dealer, forgets that even the said dealer does not categorize the product as an edible/vegetable oil or Vanaspati. The discharge of tax at a lower rate by some dealers could never be a criteria to determine the classification of a product and the tax rate thereon. The levy of tax is always in terms of the schedule entry as is available for interpretation. Therefore, no excuse about such less tax discharge by other dealers could be a reason to consider grant of prospective effect. Therefore, none of the claims to schedule entries were justified on any counts. In view of clear and unambiguous provisions and lack of misinterpretation and mis-guidance, as well, the applicant does not make out a case for favourable consideration of the request for prospective effect.

#### 07. In view of the detailed deliberations held hereinabove, it is determined thus -

## ORDER

(under section 56(1) (e) and (2) of the Maharashtra Value Added Tax Act, 2002)

No.DDQ-11-2012/Adm-6/14/B- 4

Mumbai, dt. 29/7/15

For reasons as discussed in the body of the order, it is herewith determined thus -

1. The product "DILICIA DAIRY FREE WHIP TOPPING" -

- i. is not covered by the description against the Central Excise Tariff Headings 15179090, 1516 and 1518 as notified for the purposes of the schedule entry C-54.
- ii. is not an edible oil or vegetable oil or Vanaspati (Hydrogenated vegetable oil).
- iii. falls in the residuary schedule entry E-1 for want of a specific entry therefor, thereby liable to tax @12.5%.

2. The request for prospective effect is rejected.



  
(RAJIV JALOTA)

COMMISSIONER OF SALES TAX,  
MAHARASHTRA STATE, MUMBAI